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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1023

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS GARRETT JOHNSON, DAVID MCLAURIN EDDIE JAMES CARTHAN,

Petitioners,

VS.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Mississippi's prosecution of a black mayor for the exercise of his lawful powers, when that prosecution is based upon evidence that the State admits is false, frustrates the Reconstruction Amendments and is violative of petitioners' rights under the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

2. Whether obtaining a conviction at trial by the use of testimony acknowledged to be false is a violation of due process of law as guaranteed by the Fourteenth Amendment.

3. Whether affirming a conviction on appeal on issues wholly different from those at trial, when the trial issue is based upon false testimony, is a violation of due process of law as guaranteed by the Fourteenth Amendment.

4. Whether, in the criminal assault trial of a black mayor for acts allegedly performed in the line of duty, the trial court's failure to instruct the jury on the lawful powers and duties of the Mayor and the requirements for the lawful powers and duties of the Mayor and the requirements for the lawful appointment of a police chief is a violation of due process of law, as guaranteed by the Fourteenth Amendment.

5. Whether counsel's acts and omissions, at trial and on appeal, constitutes such ineffective representation as to deny petitioners effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

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EDDIE JAMES CARTHAN,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI STATE SUPREME COURT

Samuel Callahan, John Dale, Tom Common, R. James Matthews, Garrett Johnson, David McLaurin, Eddie James Carthan respectfully petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

OPINIONS BELOW

The unpublished opinion of the Mississippi Supreme Court's denial of petitioners' writ of error coram nobis is annexed hereto. (Appendix 1). The prior unpublished opinion of the Mississippi Supreme Court, entered on August 18, 1982, affirming petitioners' conviction is annexed hereto. (Appendix 2).

JURISDICTION

On November 10, 1982 the Mississippi Supreme Court denied petitioners' writ of error coram nobis. Both parties filed petitions for rehearing which are pending before the Mississippi Supreme Court*/.

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*/ The State of Mississippi's petition for rehearing seeks to have the Court modify its opinion of November 10, 1982. The State asks the Court to change its opinion from a decision on the merits to a decision which procedurally bars peti-

(footnote continued on next page)

Jurisdiction is conferred on this Court by 28 USC §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Mississippi's prosecution of a black mayor for the exercise of his lawful powers, when that prosecution is based upon evidence that the State admits is false, frustrates the Reconstruction Amendments and is violative of petitioners' rights under the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

(footnote continued from previous page)

tioners' claims. Respondents state, "unless the opinion is modified, petitioners have been handed the keys to the federal judiciary who under the current state of affairs will have carte blanch (sic) authority to review the merits of each claim." Petitioners will move to supplement this petition, in accordance with Supreme Court Rule 22, when the petition for rehearing is decided.

2. Whether obtaining a conviction at trial by the use of testimony acknowledged to be false is a violation of due process of law as guaranteed by the Fourteenth Amendment.

3. Whether affirming a conviction on appeal on issues wholly different from those at trial, when the trial issue is based upon false testimony, is a violation of due process of law as guaranteed by the Fourteenth Amendment.

4. Whether, in the criminal assault trial of a Black Mayor for acts allegedly performed in the line of duty, the trial court's failure to instruct the jury on the lawful powers and duties of the Mayor and the requirements for the lawful appointment of a police chief is a violation of due process of law, as guaranteed by the Fourteenth Amendment.

5. Whether counsel's acts and omissions, at trial and on appeal, constitutes such ineffective representation as to deny petitioners effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIII to the United States Constitution provides, in part:

> Neither slavery not involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV to the United States Constitution provides, in part:

> .....nor shall any State deprive any person of life, liberty or property without due process of law.

Amendment XV to the United States Constitution provides, in part:

> The right of citizens to vote shall not be denied or abridged by the United States or by any State of account of race, color or previous condition of servitude.

STATEMENT OF THE CASE

In June, 1977, Eddie James Carthan was elected Mayor of Tchula, Mississippi, by defeating a white person -- former Town Marshal, Jim Andrews. Although Tchula's population had been predominantly black for many years, Mr. Carthan was the first black person to serve as mayor of the

Holmes County hamlet. Numerous incidents soon followed the 1977 election demonstrating that municipal government in Tchula would be beset with continued bickering, legal maneuvering and racial tension including the Council members' refusal to attend Board meetings, drastic reduction in the Mayor's salary, closing the doors of City Hall and refusal to approve City checks and drafts.

In April, 1980, the entire Tchula Police Department resigned. Thereafter, Mayor Carthan, exercising his powers and duties, appointed officer John Dale to run the Department pending appointment of a new chief by the Board of Aldermen. On April 30, 1980, a special meeting was held by the Board to appoint the new police chief. Following a heated discussion, the meeting ended without any decision. Thereafter, the three majority

members of the board met privately at a local convenience store and decided Jim Andrews, Mr. Carthan's 1977 mayoral opponent, should be chief.

Andrews was immediately notified. Acting quickly, Andrews armed himself and went to see John Dale who was on duty at the police department. Andrews advised Dale he was terminated. Dale left the premises and notified Mayor Carthan of the recent events. Carthan contacted the Sheriff. The Sheriff, however, took no action. Carthan and the other petitioners then went to City Hall to talk to Mr. Andrews. Meanwhile, Andrews called two other municipal employees -- Officer James Harris and night watchman, James T. Rhynes -- to assist him to taking charge of the Tchula Police Department.

An altercation ensued after the two groups confronted each other in the

police department. As a result of those events, Carthan filed an affidavit complaining that Andrews assaulted him with a weapon. Andrews filed a similar affidavit against Carthan and his group. The State declined to prosecute Mayor Carthan's charges. Instead, Carthan and his deputies were charged with aggravated assault upon a law enforcement officer, Jim Harris.

At trial, held before the Hon. Webb Franklin of the Circuit Court of Holmes County on April 20 and 21, 1981, the thesis of the State's case was that James Andrews was lawfully appointed as police chief on April 30, 1980. It called witnesses to testify that Andrews had been appointed police chief on April 30, 1980. The State's theory was that if Andrews

was lawfully appointed then the Mayor and his deputies were without lawful authority by taking over the police department.

The testimony, both of the State and the defense, made it apparent that the factual and legal issues were (1)whether or not Andrews was lawfully appointed and (2)the Mayor's powers and duties to superintend all officers, to be vigilant in enforcing the laws and to deal promptly with a violation of duty. Yet, none of the proposed instructions relating to the powers and duty of the Mayor and the requirements for lawful appointment of a police chief were granted by the trial court.*/

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*/ Proposed Instruction D-2 was:

> The Court instructs the jury that at all times relevant hereto, Eddie J. Carthan was the duly elected Mayor of the Town of Tchula, and as

(footnote continued next page)

The jury was left with the impression that Andrews could have been lawfully appointed and that the Mayor had no

(footnote continued from previous page)

> Mayor, he has superintending control of all officers and affairs of the Town of Tchula and is charged by law to take care that the laws and ordinances are properly executed.

Proposed Instruction D-3 was:

> The Court instructs you that the Mayor has the duty to be active and vigilant in enforcing all laws and ordinances for the government of the Town of Tchula and to cause all other officers to be dealt with promptly for any neglect or violation of duty.

Proposed Instruction D-6 stated:

> The Court instructs you that before Jim Andrews could lawfully perform any act as Chief of Police or Town Marshall, he must first take the oath of office and have executed and filed with the Clerk of the Town, and subject to the approval of the Mayor and Clerk, a good and sufficient bond in an amount of not less than ONE THOUSAND DOLLARS($1,000.00) nor more than TEN THOUSAND DOLLARS ($10,000.00), the exact amount having been fixed by the Board of Aldermen, which bond is conditioned upon the faithful performance of the duties of his office.

duty nor power to evict a usurper of authority.*/ They were therefore, denied the lawful basis for decision-making.

All petitioners were convicted of simple assault upon a law enforcement officer. Carthan was stripped of his office and sentenced to three years in prison.

A decisive occurrence in the midst of oral argument on July 27, 1982, before the Mississippi Supreme Court on the appeal of the conviction substantial-

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*/ Mississippi law is clear that the Mayor had the duty and power to prevent the usurpation of the police department. M.C.A. §21-3-15, §21-15-13. Even assuming, arguendo, that he pointed a gun at Harris, the Mayor certainly could display the hallmark of his authority. It is unthinkable that a police officer would be criminally prosecuted for assault for displaying his badge of authority. This is precisely what happened in this case. The jury was essentially told to view this case as if the Mayor had no powers.

ly altered the constitutional posture of this case. The Deputy Attorney General, responding to a question from the Court, announced that the State was no longer contending that Jim Andrews had been duly appointed police chief on April 30, 1980. Thus, the State abandoned the central thesis of the trial and admitted that it had provided a set of facts and legal theories known to be false.

The State then argued, contrary to its position at trial, that Andrews' status was irrelevant to the case. They stated that even if Andrews was not lawfully appointed, nevertheless, Harris had legal authority as a law enforcement officer. Thus, the State of Mississippi asked the Court to sustain the conviction on factors wholly different from those presented at trial.

The federal questions resulting from the State's new position was promptly addressed to the Mississippi Supreme Court. Petitioners filed a post-argument supplemental memorandum arguing that the State's concession confirms that the trial court's failure to grant proposed defense instructions violated the due process clause of the Fourteenth Amendment.*/ Leave to file that memorandum was denied by the Court.

On August 18, 1982 the Mississippi Supreme Court sustained the convic-

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*/ Where the federal issue is born following a surprise decision, or an unexpected basis for a claim, or upon a claim that could not have been made during trial, this Court has consistently held that a litigant may raise the federal question and the motion will be timely. Chambers v.Mississippi, 410 U.S. 284; Sarenders v. Shaw, 244 U.S. 317; Great Northern Railway v. Sunburst Co., 287 U.S. 313; Brinderhoff-Faris Trust Co. v. Hill, 281 U.S. 673. The full constitutional implications of this case only became apparent with the State's concession at oral argument. Failure to grant proposed defense instructions had been raised on appeal, although not in constitutional terms. In any event, these constitutional violations are plain error.

tions. The Court did not address the effect of the State's critical concession at oral argument and held that Andrews' status was not relevant. Its opinion indicated that the only issue was whether or not "Harris ....was acting in furtherance of .... his duty at the time of the alleged assault."*/ The Court thus sustained the conviction upon factors wholly different from those at trial.

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*/ Petitioners do not dispute Harris' status as a law enforcement officer. Nor do petitioners dispute that the proper test is whether Harris was acting within the scope of his duties. However, by definition, Harris was acting outside the scope of his authority and the jury should have been so informed -- if, as the record clearly demonstrates, Harris was part of the usurpation by Andrews of the lawless takeover of the police department, he was not in a different position than Andrews. If Mayor Carthan had the right and duty to restore order to Tchula and retake the police department from a usurper, Carthan equally had the right to stop anyone from helping that usurper; and if Andrews' helper was a policeman, than by definition, Harris was acting outside the scope of his authority.

Petitioners then filed a petition for writ of error coram nobis addressing the constitutional implications of the State's concession.

The writ also addressed counsel's numerous errors that were critical to a determination of guilt or innocence and which deprived petitioners of effective assistance of counsel.

Trial counsel failed not only to understand the broad constitutional dimensions of this case, but the essence of the case itself. The factual background of this case was not properly prepared and investigated. Available witnesses were not subpoenaed or called to testify that Andrews had not been lawfully appointed, to testify to facts proving that Harris was acting outside the scope of his duties, to testify regarding the background events in Tchula

or to corroborate Carthan's version of the events.

Counsel failed to submit specific instructions that would be deemed proper by the Mississippi courts. At trial and on appeal counsel neither noted exceptions and assignments of error in accordance with applicable state law nor raised issues in constitutional terms.

The writ was denied on November 10, 1982. The Court stated, inaccurately, that "all issues raise in the petition for writ of error coram nobis were previously considered and decided adversely to the petitioners in their formal appeal to this Court." (Appendix 1).

REASONS FOR GRANTING THE WRIT

THE MISSISSIPPI SUPREME COURT DECIDED IMPORTANT FEDERAL QUESTIONS IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

At issue is the preservation of the most fundamental rights of the black citizenry guaranteed by the Reconstruction Amendments to the Constitution which have been consistently thwarted by the State of Mississippi. In 1977 a predominantly black town finally overcame more than a century of disenfranchisement and elected its first black Mayor since Reconstruction. After attempts to make it exceedingly

difficult, if not impossible, for Mayor Carthan to govern, the State not only prosecuted the Mayor for exercising his power and duties, but obtained a conviction upon a factual and legal theory it later admitted was false and without the jury knowing the applicable law of the case.

A. Obtaining A Conviction At Trial by the Use of Testimony Acknowledged to be False and Affirming That Conviction on Considerations Different From Those Raised At Trial Conflicts With Decisions of This Court

This case is a remarkable parallel to the numerous decisions of this Court where convictions have been overturned based upon presentation of facts known by the State to be false. Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Alcorta v. Texas, 255 U.S.

28; Napue v. Illinois, .360 U.S. 264.

Especially where the central thesis of the trial was later admitted to be false, such a contrivance "to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." Mooney v. Holohan, 294 U.S. at 112.

After conceding Andrews' status, the State then argued and the Mississippi Supreme Court accepted, that this critical factual issue was irrelevant. (Appendix 2, A-46). Thus, the appeal was decided upon factors wholly different from those at trial. Due process of law does not allow a conviction to be sustained on a basis other than that which was tried. Cole v. Arkansas, 333 U.S. 196. "Petitioners were entitled to have the

validity of their convictions appraised on considerations of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. at 202. "No principal of procedural due process is more clearly established than . . . a chance to be heard in a trial of the issues raised by that charge." The Constitution does not permit the State to convict upon facts it admits to be untrue yet later claims are irrelevant.

B. The Failure to Instruct the Jury on the Lawful Duties and Powers of the Mayor and of the Requirements for Lawful Appointment of a Police Chief is a Violation of Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

A fundamental principle of the right to a fair trial is that the jury must be instructed on the applicable law of the case. Taylor v. Kentucky, 436 U.S. 478,

Estelle v. Williams, 425 U.S. 501. ".....(I)f there is any evidentiary support whatsoever for a legal defense and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing thus to charge the jury." U.S. v. Goss, 650 F.2d 1336, 1344 (5th Cir. 1981).

The proposed defense instructions pertained not only to the defense, but to the crux of the trial. The issue of whether the Mayor exceeded his authority was never presented to the jury, thereby denying them the basis for lawful decision making.

The Mississippi Supreme Court decided that the proposed defense instructions were "abstract propositions of law " that need not be given to the jury. The

Court misconstrued the nature of abstract propositions of law as announced by prior Mississippi cases, thereby denying petitioners' fundamental rights of due process of law.

Moreover, the trial court took no responsibility to insure that the jury was properly instructed on the fundamental legal principals of the case. Presumably this is because Mississippi has, thus far, remained the only state in the nation to forbid sua sponte instructions by the Court. M.C.A.§99-17-35; National Surety Corp. v. Vandevender, 108 So.2d 860 Miss.(1959); Gongloff v. State, 232 Miss. 395, 99 So. 2d 461(1958); J.C.Penny v. Evans, 172 Miss. 900, 160 So. 770 (1935).

Mississippi law thus creates the untenable position of hinging hopes for

a fair trial upon defense counsel offering precise instructions acceptable to the Court. That position is contrary to fundamental notions of the right to a fair trial and the right to trial by jury. "It is the duty of the Court to safeguard petitioner's rights, a duty only it could have performed reliably. Taylor v. Kentucky, 436 U.S. at 488-89. The sua sponte duty of the Court, addressed in the petition for writ of error coram nobis, was decided unfavorably to petitioners.

C. Petitioners Were Denied Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Circuit courts throughout this country have different standards to determine constitutionally effective assistance

of counsel. The Fifth Circuit standard is whether counsel is "reasonably likely to render and rendering reasonable effective assistance." Herring v. Estelle, 491 F.2d 125,127 (5th Cir.1974); MacKenna v. Ellis, 280 F.2d 592,599 (5th Cir.1960), cert den. 368 U.S. 877. "The methodology for applying this standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonable effective assistance was rendered based on the totality of the circumstances in the entire record." Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.1981) quoting Washington v. Estelle, 649 F.2d 276,279 (5th Cir.1981). This standard is equally applicable to retained and appointed counsel. Cuyler v. Sullivan. 446 U.S. 335,(1980).

Effectiveness is not only determined

by reference to trial performance, but by investigation and preparation (Gaines v. Hopper, 575 F.2d 1147 (5th Cir.1978) and, an "independent examination of the facts, circumstances, pleading and laws involved." Rummel v. Estelle, 590 F.2d 103,104 (5th Cir. 1979).

Counsel acts and ommissions resulted in a trial and an appeal where critical constitutional issues were not properly raised, where the jury was not instructed on the law of case*/ and where evidence critical to guilt or innocence was not presented. It is manifestly apparent that, with neither crucial facts nor applicable law, a guilty verdict would result. Prejudice to the petitioners is blatant.

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*/ Petitioners submit that the proposed defense instructions were correct. If however, it is established that instructions are "abstract" ones, counsel's failure to present instructions in accordance with Mississippi law is inexcusable.

D. The State of Mississippi's Prosecution of a Black Mayor for the Exercise of His Lawful Powers, When That Prosecution is Based Upon Evidence Acknowledged to be False, Frustrates the Reconstruction Amendments, and is Contrary to Decision of this Court.

The main thrust of the Reconstruction Amendments, the Thirteenth, Fourteenth and Fifteenth, was that the black race be freed from a system of chattel slavery and be equal participants in the hitherto white political community of the "people of the United States." Franklin, From Slavery to Freedom, 299-300 (1963); Tenbroeck, The Anti-Slavery Origins of the Fourteenth Amendment, 218-24 (1951). The Amendments were for "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited domain over him." Slaughter House Cases, 83 U.S. (16 Wall) 36 (1872).

Mississippi, charged with the responsibility to enforce those rights, engaged in perhaps the most blatant attempt to undermine the rights of black citizens. Mississippi whites were up in arms in 1869 when black registration and voting resulted in a great increase in the number of black officials. Newspaper editorials called for "A white man's Government, by white men for the benefit of white men." Mississippi Weekly Pilot, April 10, 1875.

The upshot was the Mississippi Plan of 1875 and 1890 which combined violence with discriminatory laws to disenfranchise black voters. Intimidation, both economic and physical, was common. Fraud and terrorization were so rampant for more than fifteen years that the very sources of republican government were called into question. J.S. McNeilly,

"History of the Measures Submitted to the Committee on Elective Franchise, Apportionment, and Elections in the Constitutional Convention of 1890," Publications of the Mississippi Historical Society, VI (1902) p.30. The result was a new system of disenfranchising blacks - the poll tax combined with the "educational requirement" of the interpretation of the Constitution test. By 1900 Black registration had all but vanished in Mississippi.

From 1900 until the recent times the Mississippi Plan operated in all of its manifestations to perpetuate the system of white domination. The objectives of the plan - a white man's government by a white man's rule - were systematically carried out in a variety of forms. See, U.S. v. Miss.;380 U.S. 128; U.S. v. Edwards, 333 F.2d 575 (5th Cir.1964);

U.S. v. Duke, 332 F.2d 759(5th Cir.1964); U.S. v. Lynd, 301 F.2d 818(5th Cir.1962); U.S. v. Dugan, 314 F.2d 767(5th Cir.1963).

In 1977, in Tchula, Mississippi, a black town finally overcame more than a century of disenfranchisement and elected its first black mayor since Reconstruction. The power structure, after numerous attempts to make it difficult, if not impossible, for the Mayor to govern, finally used the criminal process as the ultimate weapon against the black vote. The Mayor was prosecuted for exercising his power and duties, a step unheard of in the history of this country. That prosecution was based upon a factual and legal theory that the State later admitted was false. A conviction was obtained without the jury knowing the basis for lawful decision making.

The Black Codes were enacted after the Civil War as a substitute for the slave system; the exclusion of blacks from white communities became a substitute for the Black Codes; now the prosecution of a Mayor is but the latest substitute to deny black citizens their constitutional rights. The badges and indicia of slavery remain in force in Mississippi despite that state's affirmative duty to eradicate all relics of slavery. U.S. v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) quoting Harlan, J., Civil Rights Cases, 109 U.S.3.

CONCLUSION

The power and duty of this Court to preserve the federally protected rights of black citizens is fundamental. Petitioners were denied these most basic rights. The culmination of more that a century of the relics of slavery was the prosecution and conviction of a black Mayor based upon a factual and legal theory that the State later admitted was false.

The violations of constitutional rights, at trial and on appeal, is so gross that it can only be read as a challenge to the exercise of full voting rights by the Black people of Mississippi.

Petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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December 9, 1982

APPENDIX 1

IN THE
SUPREME COURT OF MISSSISIPPI

Misc. No. 1445

SAMUEL CALLAHAN, DAVE McLAURIN
EDDIE JAMES CARTHAN, JOHN DALE,
TOM COMMON, R. JAMES MATTHEWS,
AND GARRETT JOHNSON,

v.

STATE OF MISSISSIPPI.

EN BANC.

This cause is here on the (1) Petition for Writ of Error Coram Nobis filed by petitioners, Samuel Callahan, Dave McLaurin, Eddie James Carthan, John Dale, Tom Commom, R. James Matthews and Garrett Johnson, and upon (2) application for bail. The petitioners were convicted in the Circuit Court of Holmes County of assaulting a police officer, which conviction was appealed to this Court and affirmed.

Since affirmance of the petitioners' conviction, no petition for rehearing has been filed and the time for filing such a petition has expired. All issues raised in the petition for writ of error coram nobis were previously considered and decided adversely to the petitioners in their formal appeal to this Court. Auman v. State, 285 So. 2d 146 (Miss. 1973). The motion for bail is unaccompanied by any documentation or showing of any petition for review by the United States Supreme Court. Mississippi Supreme Court Rule 45 requires documentation be shown that the petitioner has requested certiorari to review our action as a condition for "release on appearance bond pending petition" for review by the United States Supreme Court. See Miss. Sup. Ct. Rules 34 and 45.

Accordingly, the petition for writ of error coram nobis and motion for bail are without merit and must be denied.

[November 10, 1982]

APPENDIX 2

IN THE
SUPREME COURT OF MISSISSIPPI

No. 53,361

SAMUEL CALLAHAN, GARRETT JOHNSON, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, EDDIE JAMES CARTHAN, AND DAVID McLAURIN,

v.

STATE OF MISSISSIPPI.

BEFORE PATTERSON, BOWLING AND DAN LEE

BOWLING, JUSTICE, FOR THE COURT:

This cause involves seven appellants who were tried jointly in the Circuit Court of Holmes County for the crime of aggravated assault on a police officer acting within the scope of his duty. Initially, there were eight indictees. One met his death prior to trial. The seven appellants were tried jointly with each being convicted of the lesser offense of simple assault on a police officer acting within the scope of his duty. A convic-

tion of this offense carries a maximum statutory penalty of five years imprisonment and a $1,000 fine. Mississippi Code Annotated, Section 97-3-7 (1972).

Upon conviction by a jury the following sentences were given appellants by the lower court:

Samuel Callahan, three years in the Department of Corrections with all suspended and $500 fine;

John Dale, three years in the Department of Corrections with all suspended and $500 fine;

Tom Common, three years in the Department of Corrections with all suspended and $500 fine;

R. James Matthews, three years in the Department of Corrections with all suspended and $500 fine;

Garrett Johnson, three years in the

Department of Corrections with all suspended and $500 fine;

David McLaurin, three years in the Department of Corrections with all suspended and $1,000 fine; and

Eddie James Carthan, three years in the Department of Corrections and $1,000 fine.

At the outset, primarily because of the extensive publicity given this case, we need to explain the function of the court as an appellant court. It is our duty and our obligation and we are restricted to consider only that which appears in the record made in the trial court and brought before us. Regardless of the extensive publicity, numerous letters and cards received by the court and any motivation therefor, we state without full hesitation or reservation

that the cause has been fully, fairly and adequately considered under the record before us.

The record reveals that the Town of Tchula, Mississippi, has been beset with confusion and troubles for some time. The incidents leading to the conviction of appellants occurred on the night of April 30, and the early morning of May 1, 1980. At some time around the first of April 1, [sic] the exact date not being shown in the record, the police department, consisting of 4 or 5 policemen, quit their jobs because of not being paid. James Harris, who had been a member of the police department approximately four years, was an exception. He remained on his job.

The Town of Tchula operated under what is known as the "Code Charter."

This is the statutory authority for the operation of a town with a population under 10,000 [MCA, §21-3-1, et seq.(1972)]. The governing body for the town consisted of a Mayor and five Aldermen, all elected. The statute provides that the Board of Aldermen may conduct the business of the municipality at either a regular or special meeting, with the Mayor having the deciding vote in the case of equal division among the aldermen present and voting. A special meeting of the board and mayor may be called by the mayor or any two aldermen by giving written notice served on each of the governing officials.

On the morning of April 30, 1980, two of the aldermen called a special meeting for 8 p.m. that evening. Undisputedly, the statutorily required written notice was served on each of the aldermen and the

mayor. There is quite a bit of confusion as to everything that occurred at the special meeting, part of which was had in the open part of town hall, after which a closed session was called in the office of the town clerk. It appears that two matters were placed on the agenda by the written special called notice: to-wit, an election of a mayor pro-tem and a chief of police. The inconsistencies as to what occurred during the closed meeting shall be discussed later under the various assignments of error.

As a result of the special meeting, one Jim Andrews who had been police chief [formerly town marshal] for ten years at a prior time, assumed the duties of police chief at about ten o'clock the night of April 30, the night of the meeting. One of the many inconsistencies is the manner and authority under which this was done,

and evidence about this as reflected in the record shall be discussed later.

Appellant Mayor Eddie James Carthan received notice at either his home or place of business regarding the fact that Andrews was then occupying the police department as chief of police. It is admitted without dispute that Carthan then contacted the co-indictees and told them to come to him at once; there was a serious situation that needed to be corrected. Appellants John Dale and James Matthews were then members of the police department. Appellant David McLaurin was a member of the Board of Aldermen. The remaining appellants were what Carthan designated as "auxiliary policemen." All of these people were instructed by Carthan to bring weapons, and all did so. This entourage, admittedly headed by Carthan,

went to the town hall, which as stated included the police department, where the incidents giving rise to this cause occurred.

Appellants jointly propound the following assignments of error:

I. The court erred in denying defendants' Motion to Quash the Indictment on grounds the defendants' activities were privileged and did not consitute a crime.

II. The court erred in not granting appellants' Instruction for a directed verdict.

III. The court erred in denying defendants' motion for a directed verdict or a new trial because of discrepancies in the jury's verdict.

IV. The court erred in granting state instruction numbers 2 and 4.

V. The court erred in denying defendants' instruction numbers 2, 3, 6, 7, 8, 9 and 10.

VI. The court erred in that it improperly instructed the jury on inclusion of a lesser included offense.

VII. The verdict of the jury is against the overwhelming weight of the evidence.

VIII. The verdict of the jury was not unanimous.

The motion to quash the indictment was based on the grounds that appellant Mayor Carthan was at the time of the incidents giving rise to the indictment acting in his capacity as mayor; that appellants David McLaurin was acting in his official capacity as alderman; the remaining indictees were policemen and auxiliary policemen and under the charge and direction of Mayor Carthan; that the state arbitrarily chose to prosecute the charge regarding the alleged assault on policeman James Harris which was prejudicial to appellants and that appellants were bound over to the grand jury by a justice court judge related to Andrews.

We could dispose of this assignment of error by holding that it was not a proper pleading, as it was for the pur-

pose of testing the sufficiency of the indictment. This is prohibited by prior authorities, including State v. Grady, 281 So. 2d 678 (Miss. 1973). In dealing with this appeal, however, we shall discuss all issues raised by appellants and give a decision on each.

Appellants introduced considerable testimony and evidence on the motion before the trial judge at the October, 1980 term of Circuit Court in Holmes County. [The trial of the cause before the jury was had at the April 1981 term.] The first witness called on the motion to quash was appellant Eddie James Carthan. He testified regarding the called special meeting on the night of April 30, 1980. In discussing the closed session during which the matter of appointing an acting police chief was taken up, Carthan testified that a motion was made by Alderman

Hayes to hire Jim Andrews as town marshal. Carthan, according to his testimony, ruled the motion out of order because, "we were not ready to entertain a motion until it had been discussed and other board members had time to consider the motion." According to Carthan the meeting then "was dispersed." He testified that James Harris was acting chief of police for one or two days before he appointed Johnny Dale, one of the appellants, acting chief of police on April 29. On April 29 Carthan had written a letter to this effect.

Carthan testified that after the conclusion of the Board of Aldermen meeting, he met with the police officers, including Harris, all of whom were at the town hall. Carthan told them that the police department would continue as it

was until further action by the board. Carthan then went to his place of business and sometime later appellant Dale came and told him that Andrews had come to the town hall and the police department and advised him that a majority of the board had told him to assume immediately the duties of acting chief of police. Carthan then related about calling the appellants, all but two of whom he classified as auxiliary policemen to become armed and come at once. He testified that the auxiliary policemen "were not on duty 24 hours a day like a normal policeman." He stated that he called the sheriff's office but could get no active response, so "I immediately handled the situation myself." The situation, according to Carthan, was that "we had a person come in off the street taking over the town and police department who had not been hired or anything."

Carthan then related the sequences of events that occurred at town hall and police department. He testified he led the other seven armed persons into the town hall where he asked Andrews to leave, Andrews refused, and resisted arrest by pulling a gun. He testified that it seemed a "tussle" began and Andrews got injured in the tussle. Andrews, according to Carthan, pulled the gun and pointed it at Carthan and the others. All of these men had in their hands either pistols, shotguns or rifles.

The next witness offered by appellants on the motion to quash was C.W. Johnson, now deceased. The effect of his testimony was to deny that he was in the original group led by the mayor to the town hall, but happened to be passing by at the time. He heard a gunshot and went into the town hall to see what happened.

He saw Jim Andrews lying on the floor. He then left the town hall and knew nothing further about the incidents that were occurring.

The next witness offered on the motion to quash was Justice Court Judge Shirley Neal. His authority was in District Four of the County, which district did not include the Town of Tchula. He testified that Mayor Carthan called him and asked him to agree to handle the case growing out of the charges he was making against Andrews. Judge Neal had a hearing at a later time in May. He did not know the exact date. He had been a justice court judge six months. In addition to Dale, Mayor Carthan was the only other person present and he "conducted" the hearing. He testified he was acting for the Town of Tchula at the time of the hearing. He held that Andrews

should be bound over to await the action of the next Holmes County Grand Jury.

The next witness called on the motion to quash was Jewell McPhail, who was presently serving as town clerk for Tchula. She had been clerk for ten years from 1968 to 1978. She was rehired in September, 1979 and has served continuously since that time. She testified regarding the call of the special April 30 meeting by two of the aldermen. This procedure was properly handled. She further testified that at the special meeting the mayor ruled the meeting and every motion out of order. She testified regarding the motion to hire Andrews as police chief, that his service beginning immediatedly was approved by a majority vote of the aldermen. Those voting for such action were Hayes, Granderson and Gibson. She

stated positively that "three of the aldermen voted . . ." These three later signed the minutes of the meeting; the remaining two aldermen and the mayor did not sign them. She further testified that none of the then acting policemen, other than James Harris, were ever hired by the Board. She further testified that prior to the breaking up of that meeting, appellant Carthan said at least twice that "Mr. Andrews had better not show up on the street with a gun."

The next witness called by appellants on the motion to quash was Jim Andrews. He testified "I was appointed as acting chief of police by the majority of the board of aldermen and I went to city hall and took over the office. I relieved one officer who was there, who was never hired and paid by the Town of Tchula." He was

referring to appellant Dale. He testified that he was town marshal of the town of Tchula for a term of ten years from 1968 to 1978. He stated that after the sepcial board meeting, he was called and told to come to a place of business where one of the aldermen worked; at that place when he arrived were the three aldermen -- Hayes, Granderson and Gibson. They told him that a majority of the board had elected him chief of police and requested that he immediately assume that position. He went home, put on his uniform that he previously had used; armed himself and went to the town hall. He talked with appellant Dale and told him the situation. He stated that as Dale left the town hall peacefully, he heard Dale say something about "him not hearing the last of this." He testified that James Harris, the full-time police-

man was at town hall and was requested by Andrews to work the 11 to 7 shift that night. Harris agreed and went home to secure his equipment. Andrews then heard of the mayor and other appellants coming and sent night watchman J.T. Rhyne to the home of Harris to bring him back immediately. This was done. Andrews then testified that the mayor and his men all came through the unlocked door of the town hall with weapons in their hands. Andrews, according to him, requested that the Mayor sit down and discuss the entire matter, but that the mayor did not do so. Andrews then stated that Carthan and three or four others jumped on him. They were struggling when a shot was fired. This struck Andrews on the side of the head, causing him to become unconscious and fall to the floor. When he regained consciousness, he was in a puddle of blood. He testified that when he was shot there still was a

scar. He had been carried to the hospital in Lexington, shortly after the incident ended. There the wound was sutured and he was released and placed under arrest by Mayor Carthan.

The next day Andrews filed affidavits against Carthan charging him with assault. A hearing was had in the county court room in Lexington before Justice Court Judge Dean Taylor, who was sister-in-law of Andrews. The defendant was then bound over to await any action of the next county grand jury. At the hearing, Andrews further testified that James Harris had returned to the town hall and the police headquarters. When it was known that the appellants were coming, Harris went to the back room where the radio and telephone were kept and attempted to call the county sheriff. He had turned the lights off in the room

but could still see the lighted telephone numbers. He was attempting to reach the sheriff when appellants came into the main town hall room.

The next witness called by appellants on the motion to quash was James Harris. He testified he had been a town policeman for four years. He stated he was in the back room when he saw appellants come into the town hall, and they all aimed at Mr. Andrews with their guns. He was not questioned about the remaining part of the incidents that thereafter occurred.

The last witness called by appellants on their motion to quash was Mrs. Dean Taylor. She testified she was Justice Court Judge in District 5 which included the Town of Tchula, and she was serving as municipal judge for the town. She testified that Andrews and Harris filed charges against appellants after the in-

cidents hereinbefore related occurred. After a hearing, appellants were bound over until the next convening of the county grand jury. The witness testified that prior to her hearing, she asked the justice court judges in Districts 2 and 3 to hear the cause, but was unable to get them to do so.

The first and foremost contention in appellants' motion to quash was that Mayor Carthan is charged by statute with superintending control of all officers and affairs of the municipality and was, at the time of the incidents hereinbefore set out, acting in his capacity as mayor. From the foregoing discussion of a portion of the testimony on the motion, and assuming it to be true, as the trial court was, and this Court is required to do, there can be no question but that it was a question of fact as to whether or not

Carthan and his assembled policemen and auxiliary policemen exceeded any authority he had as mayor, or whether or not his action was taken in a reckless, improper and criminal manner. Certainly the testimony related above was sufficient to withstand attack on the charges set out in the indictment.

Next, the other appellants contend that they were acting in official capacities and under the immediate charge and direction of Mayor Carthan. It suffices to say that assuming the mayor led them astray and gave them illegal orders, and if they followed the mayor when any unlawful or illegal actions were carried out, they would be just as much guilty as the mayor. Anderson v. State, 397 So. 2d 81 (Miss. 1981); Bass v. State, 231 So. 2d 495 (Miss. 1970); McBroom v. State, 217 Miss. 338, 64 So. 2d 144 (1953); Hardy v.

State, 180 Miss. 336, 177 So. 911 (1938); Kittrell v. State, 89 Miss. 666, 42 So. 609 (1907); and McCoy v. State, 91 Miss. 257, 44 So. 814 (1907). The testimony as to these appellants clearly withstands an attack on the indictment.

The motion contends that the state arbitrarily chose to prosecute the alleged assault on policeman James Harris. There was absolutely no proof that the state made a selective prosecution. The prosecution has the right to exercise a conscious degree of selectivity in prosecuting individuals for similar conduct. Only in rare cases may a selection of prosecution establish a prima facie case of discrimination or selective prosecution. U.S. v. Diggs, 613 F. 2d 988 (D.C. Cir. 1979).

Appellants cite no authority to substantiate their contention on the above ground.

Appellants' contention that the motion to quash should be sustained for the reason that the justice court judge for the district including the Town of Tchula, after being unable to get another justice court judge to hear the matter, in effect passing the entire matter over to the next county grand jury call, was sufficient to attack the allegations of the indictment. Again, no authority is cited for this contention. Furthermore, the court may take judicial knowledge that the presentation of evidence before a regularly convened grand jury is an entirely new proceeding and has nothing whatever to do with a preliminary hearing had before a justice court judge, not required to have legal training. The indictment charges against appellants were made solely by the grand jury and there is

absolutely no charge that there was any irregularity in those proceedings.

In their brief, appellants, for the first time, state that the due process rights of appellants under the Fifth and Fourteenth Amendments of the United States Constitution were violated. In the first place, no authority whatever is cited for this contention. Furthermore, a constitutional question was not raised in the lower court or in the assignements of error to this Court. Pursuant to the requirements of Mississippi Supreme Court Rule 6(b), we cannot consider such arguments here that were not presented to the lower court, or were not preserved in the lower court and were not advanced on appeal to this Court. Additionally, even assuming that the due process question is before this Court, no authority is needed to make a definite conclusion that the

charges in the indictment and the hereinabove related evidence on the motion to quash, did not result in a denial of the due process rights of appellants. We find that there is no merit in the motion to quash.

APPELLANTS' MOTION FOR A DIRECTED VERDICT AND PEREMPTORY INSTRUCTION OF ACQUITTAL:

As hereinbefore set out, the trial of the cause was had at the April 1981 term of Circuit Court in Holmes County, several months after the evidentiary hearing on the motion to quash the indictment. The evidence at the trial was not as lengthy as the evidence on the motion. Also, some witnesses were not called and some that did not testify on the motion were called. In considering the appeal from this point on, we consider only the proceedings at the jury

trial and post-trial proceedings. For what it is worth, it is noted that a different trial judge presided at the jury trial from the one who heard the evidence on the motion to quash the indictment.

The first witness called by the state after selection of the jury was City Clerk Jewell McPhail. She testified that altogether she had been city clerk for about twelve years and was so acting on April 30, 1980. She introduced the minutes that were typed subsequent to the special meeting of the mayor and board of aldermen. These minutes showed that all six officials were present. Regarding the appointment of a chief of police, this action was taken after the mayor and board went into executive session. There was a motion by Alderman Hayes to hire Jim Andrews as police chief, with his

service to begin at once. There was a second by Alderman Granderson and a third by Alderman Gibson. The minutes were signed by these three aldermen. McPhail testified that the majority of the board voted to hire a police chief at the special meeting and a salary of $700 per month set. This was reflected in the minutes. McPhail testified that three aldermen voted "yes" and two voted "no." The ones who voted "yes" were the three set out above. The two voting "no" were Jesse Banks and one of the appellants, David McLaurin.

McPhail testified that afterwards, appellant Carthan twice made a statement that "Mr. Andrews better not be caught on the streets of Tchula with a gun."

McPhail further testified that it would have been impossible for Andrews to have secured a bond that night and that

no oath was administered to him in her presence.

In regard to the failure of the mayor's name to be signed to the minutes, McPhail testified that he had signed hardly any of the minutes since she had been back to work at of September 1979. On cross examination as to why the "nay" votes were not typed on the minutes and notation that the motion was carried, McPhail stated that she did not know why this did not appear, but that the vote on the motion occurred.

Witness Nathaniel McCoy testified that on the night of April 30, 1980, he passed by in his car Mayor Carthan's place of business and saw the mayor and the group out in front talking. He drove down to town hall and told Andrews and Harris about the men gathering. He then got back in his car and had not left when

the appellants came down and "broke in, just push into city hall." He testified the men had guns, pistols and rifles. The witness heard a gunshot, but he did not go inside city hall. He stated that Mayor Carthan was in front of the group. They "all just tried to go in there at one time."

Witness Morris Davenport testified that on the night in question he was in the city hall waiting on a bus to go to Jackson to visit his sick wife. He saw the men coming in the door with guns, so he reached and got his suitcase and went out of the building. He testified he was scared.

The state next called witness Jim Andrews. Prior to Andrews taking the stand, the attorney for appellants, out of the presence of the jury, and in the court's chambers made the following

motion. "Your Honor, we would like to move at this time that the witness Mr. Jim Andrews, which is the affiant under another charge which we are not trying here today, we would like to have a motion limiting his testimony to the facts and circumstances surrounding the allegations against Jim Harris. The potential for prejudice in this matter is so great that we felt compelled to make this motion outside the hearing of the jury." The court sustained this motion and instructed the attorneys to instruct witness Andrews to relate only what occurred in regard to James Harris. Andrews testified that at about 9 p.m. he was requested to come to where the three aldermen were who voted to make him police chief, and that he went there and discussed with them his appointment. All three of the aldermen were present. He was informed

that he was police chief as of the adjournment of the special meeting.

Andrews testified that he had been chief of police for ten years, from 1968 to 1978; and he still had his uniform and service revolver. He put on his uniform, armed himself and went to town hall. He testified that he informed Dale about the situation and that Dale left the city hall stating, "you haven't heard the last of this," or something similar.

Andrews then sent J.T. Rhyne, town night watchman, to find Officer James Harris to see if he would come and take the 11 to 7 shift. Harris came between 11:30 and 12 p.m.

Andrews further testified that the mayor, leading the other appellants, "bursted" in the front door with rifles, shotguns and pistols and took over the three, that is, Andrews, Harris and Rhyne.

Andrews testified that Harris was in the small back room trying to call the sheriff for assistance; that the mayor got him out of the room and pointed a pistol at Harris' head and "that is all I remember."

Andrews testified that he did not have an opportunity to secure a bond or take an oath on the night of the 30th, but he took his oath the next day by signing a form that was already filled in at the town hall.

Andrews testified that James Harris was on duty at the time the incidents occurred. At the time he was in the radio and telephone room, where an officer was required to be, and was engaged in trying to locate the sheriff. Harris had been a police officers continuously for four or five years. Andrews further testified he considered himself the duly authorized

city police chief because of the directions of the majority of the board of aldermen following the special meeting.

James Harris testified that he had been a police officer for the Town of Tchula over four years continously. He testified that after Andrews was told by the three aldermen of his new job, he went home to get his equipment and his uniform. He had not completed these actions when Officer Rhyne knocked on the door and told him to come quickly that there was going to be trouble and he was needed. Harris stated about midnight he was in the small back room as he had come on duty at 11 p.m. He related about the mayor and the group coming in with shotguns, pistols and rifles while he was in the back room. The group had their weapons in their hands when they came in.

He stated Andrews requested that the mayor sit down and talk the matter over. Thereafter appellant Callahan put his gun in the back room and ordered whoever was in there to come out with their hands up. Harris stated he put his hands up and started walking out the door. Just as he stepped out the door, he saw the mayor aim his pistol at his head. He thought he would be "dead in a minute" and was afraid. He stated that the mayor pulled him around and that at that time he was struck twice, once on the shoulder and once on the arm. He stated he did not attempt to pull his gun, but that during one of the times he was struck his gun fell from its holster to the floor. Harris did not know which of the group struck him, as he had been pulled around.

On cross examination Harris testified he understood Andrews to have been

made chief of police because the three members of the Board of Aldermen told him so. Harris testified positively that he was working on the night of April 30 and that he was on duty at the time the incident occurred.

The state rested its case.

The first witness called by the appellants was Johnny B. Dale, one of the appellants. He testified that at no time during the night of April 30 did he hit, point a gun at, or otherwise assault James Harris. On cross examination, an instrument was shown Dale purported to be from the mayor dated April 20, 1980, appointing Dale acting police chief. He stated a couple of days before the incidents, he was so informed by the mayor. Dale testified that when the group went to the town hall, "we went inside city hall and the mayor started talking with

Mr. Andrews. He told Mr. Andrews he had not been elected chief of police or was not a police officer and to go home and let the board settle it. It wasn't up to the police officers, let the board settle it, so we left."

Dale denied that there was an altercation or a scuffle or some sort of involvement between the people who were present, except "One." He testified he was present when Harris came out of the back room. He did not know whether he had his hands up or not. He did not see the mayor or Harris, as at that minute his attention was focused on Mr. Andrews.

The final witness introduced by appellants was Eddie James Carthan, one of the appellants. He testified he was elected mayor of the Town of Tchula in June 1977. He recalled the special called meeting of the board of aldermen.

The items listed on the special call were concerning a mayor pro-tem and hiring a chief of police. No official action was taken on these items. He testified that any three of the aldermen could sign the minutes. He stated that the meeting was not adjourned, but that they had dispersed. He advised Dale that he would remain acting chief of police until the board met and resolved the issue. He related calling the auxiliary policemen and stated that when they went to the city hall he was talking to Andrews when he "pulled a gun on me." He stated further "after the commotion had ended, there was some noise in the back and someone said, 'it's someone in the back' and he was asked to come out of the back." Harris came out of the back, according to Carthan, and when asked to give the mayor his equipment, he did so and went

home. Carthan denied pointing a gun at Harris or hitting him. "This is the first time I had knowledge of him being assaulted." He stated that Harris was not on duty at the time. On cross examination Carthan again related his action in getting the armed group together. Upon being questioned about confusion and disagreements at the board meeting that night and at other meetings, he said, "We always have had disagreements."

Carthan testified that the meeting was called for the purpose of hiring someone to serve as chief of police but "they did not hire anyone," and that "we did not even make it to that subject." Carthan admitted on cross examination that Harris would have the right to perform duties other than whatever the schedule called for.

WAS THE COURT IN ERROR BY DENYING APPELLANTS' REQUEST FOR A DIRECTED VERDICT AND PEREMPTORY INSTRUCTION?

It is elemental that the responsibility for determining disputed questions of fact rests with the jury. This principle has been stated by this and other courts in cases too numerous to cite. A few are: Cutrer v. State, 410 So. 2d 1308 (Miss. 1982); Davis v. State, 320 So. 2d 789 (Miss. 1975); Ainsworth v. State, 304 So. 2d 158 (Miss. 1967); and Cobb v. State, 235 Miss. 57, 108 So. 2d 719 (1959).

Another elemental principle is that this Court in reviewing whether or not the jury had sufficient evidence to make its finding of fact is required to examine the facts most favorable to the party against whom the motion for directed verdict or peremptory instruction is requested, in this case the state.

Bullock v. State, 391 So. 2d 601 (Miss. 1980); Wright v. State, 387 So. 2d 735 (Miss. 1980); and Saik v. State, 387 So. 2d 751 (Miss. 1980). See also Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Regardless of the above set out principle, we carefully have studied every word of the trial record and state without reservation that the evidence clearly made a case for the jury to decide.

Appellants claim that they were entitled to the peremptory instruction because the state failed to prove that Harris was a police officer acting within the scope of his duty and that the acts of appellants were done with proper public authority and therefore were justifiable. From the above discussion of evidence, it is undisputed that James

Harris had been a full-time police officer for the Town of Tchula for more than four years. The only question was whether or not he was on duty at the time of the incidents revealed in the record. There was a conflict on this question. Harris stated positively that he was on duty. This was confirmed by Andrews whose position was questionable, to say the least, at that time. Harris' position was entirely different from that of Andrews. Whether or not Harris was acting within the scope of his office as a full-time policeman depends on whether or not he was performing a legal duty associated with his office as distinguished from engaging in a personal frolic of his own. United States v. Martinez, 465 F. 2d 79 (2d Cir. 1972); United States v. Cho Po Sun, 409 F. 2d 489 (2d Cir. 1969), cert. den. 396 U.S. 864. See also Watkins v.

State, 350 So. 2d 1384 (Miss. 1977); and Gardner v. State, 368 So. 2d 245 (Miss. 1979)

Harris' position did not depend upon the "legal" status of Andrews. Conceding that the exact legal position of Andrews was questionable, the position of Harris clearly was dictated by the orders of a majority of the Board of Aldermen. Even though Carthan denied that the subject of electing a police chief was discussed at this special meeting, the testimony of the City Clerk McPhail and the minutes reveal otherwise. All of this made a question for the jury to decide as to the status of Andrews and without a doubt it was, to say the least, a question for the jury as to the status of Harris.

Appellant Carthan contends that he as mayor had authority under the applicable statutes to do what he did on the

night in question. Admittedly, in addition to giving the mayor a vote in case of a tie, he had the superintending control of all the officers and affairs of the municipality and had the duty to take care that the laws and ordinances are executed. MCA §21-3-15 (1972). The question here is whether or not it was a jury question as to Mayor Carthan, along with the other appellants, exceeding that authority. We find that there clearly was such a jury question. We are without any power to overturn that finding of fact by the jury. It certainly cannot be argued that the jury had to accept as law that the mayor was exercising his statutory power properly when he got together a group of armed men and led them into the city hall with guns in their hands and the incidents occurred as hereinbefore related. The jury had the right to

disbelieve the mayor when he testified that Andrews pulled his gun at a time when seven or eight guns admittedly were pointed in Andrews' direction. It was a question for the jury as to whether or not the mayor led his group into exceeding the statutory authority.

Appellants' Assignments of Error Numbers 3 and 8 involve the same situation. After the jury returned its verdict, a member of the clerk's office found twelve slips of paper in the jury room. Eleven of these had the words "guilty of simple assault" written on them and the twelfth had "guilty of simple assault on a police officer" written on it. The jury received complete instructions from the court that if they did not find appellants guilty of aggravated assault on a police officer they could find them guilty of simple

assault on a police officer acting in the line of duty. The jury on instructions from the court returned seven separate verdicts as follows: "We the jury find the defendant _____ guilty of simple assault on a law enforcement officer." [The name of each of the appellants was inserted where the blank appears above.] The jury was polled and each stated it was his or her verdict. The jury clearly followed the instructions of the court. The jurors found from the evidence that none of the appellants were guilty of the charge for which they were indicted and which carried a heavier penalty but found them guilty of a lesser charge of simple assault. We find no error in these assignments of error by appellants.

Appellants contend that the court erred in granting Instruction Nos. 2 and

4 for the state. We have carefully examined these instructions and find them to be proper. Instruction No. 2 authorized the jury to find the lesser offense than that charged in the indictment as we have above discussed. Instruction No. 3 advised the jury that when two or more people act in concert committing a crime, then all who participate in the common plan are equally responsible. The law is clear that persons committing crime in concert may be found equally guilty by the jury. Anderson v. State, supra; Bass v. State, supra; McBroom v. State, supra; Hardy v. State, supra; Kittrell v. State, supra; and McCoy v. State, supra.

Appellants complain of the court refusing Instructions 2, 3, 6, 7, 8, 9 and 10. At the outset, the record reveals that Instruction No. 7 was withdrawn by

appellants. Instruction 10 was the request for peremptory instruction which we have already discussed.

The remaining instructions requested by appellants and refused by the trial court are as follows:

Instruction No. 2

> The Court instructs the jury that at all times relevant hereto to Eddie J. Carthan was the duly elected Mayor of the Town of Tchula, and as Mayor, he has superintending control of all officers and affairs of the Town of Tchula and is charged by law to take care that the laws and ordinances are properly executed.

Instruction No. 3

> The Court instructs you that the Mayor has the duty to be active and viligant in enforcing all laws and ordinances for the government of the Town of Tchula and to cause all other officers to be dealt with promptly for any neglect or violation of duty.

Instruction No. 6

> The Court instructs you that before Jim Andrews could lawfully

perform any act as Chief of Police or Town Marshall he must first take the oath of office and have executed and filed with the Clerk of the Town, and subject to the approval of the Mayor and Clerk, a good and sufficient bond in an amount not less than ONE THOUSAND DOLLARS ($1,000.00), nor more than TEN THOUSAND DOLLARS ($10,000), the exact amount having been fixed by the Board of Aldermen, which bond is conditioned upon the faithful performance of the duties of his office.

Instruction No. 8

The Court instructs you that Eddie J. Carthan, as Mayor of the Town of Tchula, is given the lawful power to veto, in writing, giving his reasons therefor, any measure passed by the Board of Aldermen. Any measure so vetoed may be adopted notwithstanding; if two-thirds of the Aldermen voted therefor.

Instruction No. 9

The Court instructs you that two-thirds of the five member Board of Aldermen of the Town of Tchula is four (4) votes.

The above set out instructions, the refusal of which is complained of by appellants as being erroneously refused,

clearly were erroneous. They all were abstract statements of law, mostly the quoting of statutes describing the duties of municipal officials, principally the mayor. We have held in many cases that abstract instructions such as the ones complained of here should not have been given. Harkins v. Paschall, 348 So. 2d 1019 (Miss. 1977); Freeze v. Taylor, 257 So. 2d 509 (Miss. 1972); New Orleans J. & G. N.R. Co. v. Statham, 42 Miss. 607 (1869); 53 Am. Jur., Trial §370, p. 1089 (1941). The trial judge granted defendants' Instruction No. D-4 which was not in the abstract and included the matters sought to be placed before the jury in the refused instructions. D-4 reads as follows:

> The court instructs the jury that if you find from the evidence that the Mayor, Eddie J. Carthan believed a breach of the peace was taking place in the Town of Tchula on April 30, 1980, and because of his belief, the Mayor

> exercised his lawfully (sic) authority to call on the policemen and other citizen(sic) to aid in enforcing the laws and that the acts, if any, of Eddie James Carthan, John Dale, Samuel Callahan, David McLaurin, Tom Common, R. James Matthews, and Garrett Johnson toward James Harris were justified and necessary in discharging the legal duty of the Mayor or in lawfully keeping and preserving the peace, then you shall find the defendants "not guilty."

In addition to refusing Instruction No. 6 as being in the abstract and not related to other facts necessary for consideration by the jury, the instruction relates only to the controversy as to whether or not Jim Andrews had fully qualified as chief of police on the night in question. As we have seen, this case does not involve an alleged attack on Andrews and is not determined by whether or not he was fully qualified by not performing the acts set out in the instruction. The indictment and the trial were for an alleged

attack on Andrews and is not determined by whether or not he was fully qualified by not performing the acts set out in the instruction. The indictment and the trial were for an alleged attack on an admittedly full-time policeman, James Harris. The question for the jury to have considered was whether or not Harris, admittedly on twenty-four-hour service, was acting in the furtherance of that service and his dutiy at the time of the alleged assault. The jury was fully instructed on this question.

Appellants complain of the Court instructing the jury that they could bring back a verdict of a lesser charge included offense from that charged in the indictment. The trial judge gave the jury a separate instruction on each defendant and each instruction clearly and plainly advised as to the four alternatives that

could be found by the jury: namely, (1) guilty as charged, (2) guilty of aggravated assault, (3) guilty of simple assault on a police officer, or (4) not guilty. In the first place there was no objection in the record to these instructions and this assignment of error should not be considered here. We, however, considered the assignment and find no error. The law is clear that on indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense. MCA, §99-19-5 (1972). This Court has held that simple assault is a constituent offense of assault to kill and murder. Howard v. State, 212 Miss. 722, 55 So. 2d 436 (1951); Blakely v. State, 165 Miss. 503, 144 So. 864 (1932); Bedwell v. State, 50 Miss. 492 (1874).

It certainly cannot be said that simple assault is not a constituent offense of aggravated assault.

We already have discussed Assignment of Error No. 7. It is that the verdict of guilty is against the overwhelming weight of the evidence. As stated at the outset, we are an appellate court whose obligation and duty is to review questions of law which include the decision as to whether or not a jury had sufficient facts to make its finding. As hereinbefore emphatically pointed out, we can reach no conclusion other than this case was purely and simply a jury question. The jury saw fit to find the appellants not guilty of the crime for which they were indicted, but guilty of the lesser offense under which each was sentenced. The imprisonment sentences for six of the appellants were

suspended. The imprisonment sentence for the seventh was much less than the maximum authorized by statute.

After a careful study of the record and briefs in this cause and hearing the oral argument, we find that there is no reversible error shown. The cause is therefore affirmed as to all appellants.

AFFIRMED.

PATTERSON, C.J., AND SUGG AND WALKER, P. JJ., AND BROOM, ROY NOBLE LEE, HAWKINS, DAN LEE AND PRATHER, J.J., CONCUR.

NO. 82-1023

Office Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN and EDDIE JAMES CARTHAN,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-1023

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R.JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN, EDDIE JAMES CARTHAN,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT.

JURISDICTION

A petition for writ of certiorari was heretofore filed with this Court on December 13, 1982. Pursuant to Supreme Court Rule 22, petitioners hereby move to supplement the petition for certiorari with the February 18, 1983 decision of the Mississippi Supreme Court

on the petition for rehearing upon petition for writ of error coram nobis, annexed hereto. (Appendix 3)

SUPPLEMENTAL STATEMENT

The opinion of the Mississippi Supreme Court neither grasps, nor acknowledges, that this case concerns a black mayor who acted to preserve the integrity of his office by preventing the usurpation of the town's police department. Rather, the Court ignores the fundamental constitutional violations that flowed from an unexpected critical concession by State of Mississippi. The court views this case as one where that concession had no effect upon the nature and constitutionality of the trial.

The State of Mississippi prosecuted Mayor Carthan for an alleged assault upon one of his subordinates, one James

Harris, a local police officer. It was apparent that this confrontation between Mayor Carthan and James Harris grew out of an effort of a faction of the Tchula Board of Alderman to usurp the powers of the Mayor.[1] That faction appointed a new police chief, James Andrews, who had been defeated by Carthan in the mayoral election. Andrews took charge of the police department and gave orders to James Harris.

During oral argument of the underlying appeal before the Mississippi Supreme Court, the State of Mississippi conceded, for the first time, that Andrews was not lawfully appointed. It necessarily follows that

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[1] See Petition for Certiorari, pp.6-9.

Andrews had no power to give orders to Harris.

No longer was this a case of an alleged assault upon a police officer. It suddenly became obvious that it was a case of a black mayor trying to prevent the usurpation of his office.

The State, at trial, obviously understood the lynchpin of Andrews' status. It presented testimony to prove that Andrews was lawfully appointed. [2] This claim was presented

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[2] The State first called the City Clerk, Jewel McPhail, to testify from the minutes of the Board of Aldermen of April 30, 1980. She stated that Andrews was voted by the Board to be police chief. Andrews testified that he was called by three aldermen and told that he was police chief and proceeded to operate accordingly including calling Harris to the police station to assist him and removing acting police chief, John Dale. Mississippi law requires a bond and oath of office prior to a lawful appointment; both McPhail and Andrews testified that there was no time to get one.

despite the fact that the minutes of the Board of Alderman meeting of April 30, 1980 showed that no such appointment was recorded. Surely, at trial, the State either knew or should have known that the appointment was not lawful.

The jury was presented with this evidence without any instructions that placed before them the requirements for lawful appointment of a police chief. Thus, the State's evidence, combined with the Court's failure to properly instruct the jury, left them to draw the conclusion that Harris was acting "within the scope of his duties" because he obeyed the orders of the "lawfully appointed" Andrews.

When faced with the serious implications flowing from the State's concession that Andrews was not lawfully appointed, the Mississippi Supreme Court avoided the constitutional issue by declaring Andrews' status to be irrelevant and attempted to narrow the issue to whether Harris was acting "within the scope of his duties." (App.3 pp.7-9) What this logic fails to address is the essence of the case; the scope of Harris' duty was inherently dependent upon Andrews status. The Mississippi Supreme Court wholly ignores this critical rule of law.

It is virtually unheard of that a Mayor would be prosecuted for acts to prevent what is now admittedly an unlawful usurpation of a town's police department. It is conceivably justified to prosecute a Mayor if the

State believed that Andrews was lawfully appointed. However, when the State conceded he was not, it became apparent that not only was the trial replete with constitutional violations but that a prosecution and conviction based upon false testimony was the latest tactic by the State of Mississippi to challenge the full voting rights of Black people of Mississippi.

Once again, the Mississippi Supreme Court opinion obfuscates petitioners 13th, 14th and 15th Amendment claims, in this instance by mischaracterization. Contrary to the Court's statement (App. 3, p. 6-7), this claim is not the same as the selective and arbitrary prosecution argument advanced pretrial. This claim flowed directly from the State's concession and concerns not merely the

fact of prosecution, but the prosecution and conviction based upon false testimony.

The Court also fails to acknowledge that the full constitutional implication of the failure to instruct on the powers and duties of the Mayor and the requirements for the lawful appointment of a police chief only became apparent with the State's concession. (App.3,p.6) Since the Court's opinion on the underlying appeal did not address the concession and its impact on the failure to properly instruct the jury, this matter could not have been properly raised in a petition for rehearing. (See App.3,p.6) It had to be addressed based upon "new facts" in a petition for error coram nobis which petitioners promptly filed.

Not only does this recent opinion obfuscate these issues, but the Court's opinion regarding the claim of ineffective assistance of counsel is a result of the State's attempt to delay petitioners' access to the federal courts.[3] The Court reviews petitioner's substantial indicia of ineffective assistance and announces that the claims are not presented with enough "specificity". With the exception of presenting a list of witnesses and a summary of their testimony to the Court, it is a mischaracterization of the petition for writ of error coram nobis to claim that they were presented in "broad general terms." A copy of

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[3] See n.2 in the Petition for Cert, pp.2-3 quoting the State's plea to the Mississippi Supreme Court to prevent petitioners access to federal court.

that petition is annexed hereto. (Appendix 4 see pp.12-16) Sufficient facts and specific allegations were presented to allow a full hearing in this matter. The Court's opinion can only be read as an effort to prevent petitioner from immediate access to this Court.

CONCLUSION

This case has been permeated with masks of deception of serious constitutional proportions. The recent opinion of the Mississippi Supreme Court does little to remove that mask and can only be viewed as Mississippi's latest and most sophisticated attempt to deny the right of black citizens to elect one of their own to govern. The petition for certiorari should be granted.

Respectfully submitted,

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Dated: March 8, 1983

APPENDIX 3

IN THE SUPREME COURT OF MISSISSIPPI
MISC. NO. 1445

SAMUEL CALLAHAN, DAVE McLAURIN,
EDDIE JAMES CARTHAN, JOHN DALE,
TOM COMMON, R. JAMES MATTHEWS
AND GARRETT JOHNSON

v.

STATE OF MISSISSIPPI

EN BANC
PRATHER, JUSTICE, FOR THE COURT:

This cause involves (1) petitions for rehearing filed by both the appellants and the state on denial of petition for writ of error coram nobis filed by the above named seven petitioners, and (2) an application for bail filed by Eddie James Carthan. The prior opinion of the Court handed down the 10th day of November, 1982, is withdrawn, and the following is now the Court's opinion.

The petitioners were convicted for the crime of assaulting a police

officer in the Circuit Court of Holmes County.[1] On appeal, we affirmed in an unanimous decision. Callahan v. State, 419 So.2d 165(Miss.1982). No petition for rehearing was filed in the case (No. 53,361), and the time for filing such a petition has expired. Miss. Sup. Ct. Rule 14.

On October 1, 1982, the petitioners filed their post-conviction petition for relief (Misc.No. 1445), which was entitled petition for writ of error coram nobis. The assignments of error in the petition were concerned with both the trial and appellate

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[1]Each of the petitioners were sentenced to serve terms of three(3) years. However, the sentences of Callahan, Dale, Johnson, Common, Matthews, and McLaurin were suspended. Only Carthan was required to serve time in prison.

proceedings, and may be summarized as follows:

1. Due Process - failure of trial court to instruct on powers and duties of mayor (requested instructions D-2 and D-3 and requirements for lawful appointment of a chief of police (requested instruction D-6).

2. Due Process - use by the state of false "facts and theories" to obtain a conviction.

3. Due Process - affirmation by this Court of petitioners' convictions upon a theory different from that employed in the trial court.

4. Thirteenth, Fourteenth and Fifteenth Amendments - use of the criminal process to disenfranchise black voters.

5. Sixth/Fourteenth Amendment - denial of effective assistance of counsel.

Carthan filed his additional petition for bail in order to obtain a release from confinement while this Court considered the petition for writ of error coram nobis.

I.

We first adress the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such postconviction petitions are limited in nature. Justice Ethridge, in the case of In re Broom's Petition, 251 Miss. 25, 168 So. 2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:

> The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceedings, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after

> rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial. [Emphasis added]. [251 Miss. at 32-33, 168 So. 2d at 48].

With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. Auman v. State, 285 So.2d 146 (Miss. 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." Holloway v. State, 261 So. 2d 799, 800 (Miss.1972).

IIA.

The petitioners' first assignment of errors concerns the failure of the trial court judge to grant certain jury instructions requested by the petitioners' counsel. (D-2 and D-3 were instructions definding the powers and duties of mayors) (D-6 defined the requirements for the lawful appointment of the chief of police). This same issue was raised by the petitioners on appeal. 419 So. 2d at 176. The proper time to reconsider such an issue would have been on a rehearing of the appeal, but the petitioners failed to file for a rehearing. They cannot now attempt to relitigate a question of law already decided on appeal by this Court through a petition for writ of error coram nobis.

IIB

For the same reason, the petition-

ers' fourth assignment is also an improper ground for granting a writ of error coram nobis. The fourth assignment alleged that the prosecution unconstitutionally chose to prosecute the petitioners in order to disenfranchise black voters. On appeal, the petitioners argued that the state selectively and arbitrarily chose to prosecute the petitioners. Id. at 171. It is readily apparent that the petitioners are simply attempting to relitigate the same question of law again. Consequently, this assignment does not meet the "error of fact" requirement.

IIC.

The petitioners' second assignment alleges that the state used false "facts and legal theories" to obtain the convictions. This claim is based

on an alleged admission by the state's appellate attorney, during oral argument before this Court, that Jim Andrews was not a lawfully appointed officer when he was assaulted by the petitioners. As a result of this supposed admission, the petitioners additionally contend, in their third assignment, that their convictions were affirmed on "grounds alien to the theory upon which the prosecution proceeded at the trial level."

The petitioners' claims are totally devoid of merit because the prosecution proceeded, throughout trial and on appeal, on the theory that the petitioners had assaulted James Harris, a member of the Tchula police department. The indictment on which the petitioners were charged specifically accused them of attempting to cause serious bodily injury to James Harris.

At trial, the facts revealed that both Harris and Andrews were assaulted during the incident in question. In fact, the petitioners claimed on appeal that they were entitled to a peremptory instruction because the state had allegedly failed to prove that Harris was a police officer acting within the scope of his duty. Id. at 174. On appeal, we noted that the case involved an attack on Harris. Id. at 177. Clearly, the prosecution proceeded on the basic premise that Harris was the victim of the crime charged, and did not proceed on the premise that Andrews was the victim. These assignments fail to supply the petitioners any basis for a writ of error coram nobis.

IID.

The petitioner's final assignment involves a claim of ineffective counsel, an issue not asserted on appeal.

We address it for the first time in this post conviction proceeding.

Since 1932, the United States Supreme Court has recognized that the constitutional right to assistance of counsel in criminal cases includes the right to effective assistance of counsel. Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955); Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). But, the Court has never fashioned a specific test for determining whether a defendant has received effective counsel. Comment, The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?, 59 Neb.L. Rev. 1040 (1980); T. Fitzhugh, III, Providing Effective Assistance: The Duty of Defense Counsel, 4 Am.J. of Crim.L. 123 (1975-76). In McMann v.

Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed 2d 763(1970), the Court stated that an attorney's service must be within "the range of competence demanded of attorneys in criminal cases," but that questions involving the effectiveness of counsel should generally be "left to the good sense and discretion" of the lower courts. 397 U.S. at 771. Beyond this general language, the United States Supreme Court has placed the responsibility of specifying standards for adequate representation by counsel upon the lower courts. This has resulted in several different standards by the various federal courts of appeal. Comment, Ineffective Assistance of Counsel: Who Bears the Burden of Proof?, 29 Bay L.Rev. 29 (1977).

In Mississippi, our Court has applied several different tests. See,

e.g. Edwards v. State, 413 So.2d 1007 (Miss.1982) ("offensive to the common and fundamental ideas of fairness and right" test); Parham v. State, 229 So.2d 582 (Miss.1969)("mockery of justice" test); Stewart v. State, 229 So. 2d 53 (Miss.1969) ("reasonable likely to render and rendering reasonably effective assistance" test).

In MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), the federal court employed for the first time the test of "counsel reasonable likely to render and rendering reasonable effective assistance." Id, at 599. This test is now used regardless of whether counsel is appointed or retained. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed. 2d 333 (1980). And, under this test, the court must not limit itself to a review of the counsel's performance at trial. Washington

v. Watkins, 655 F.2d 1346 (5th Cir.1981), cert. denied, ____U.S.___, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

In applying the test, the first line of inquiry is to determine whether the counsel was reasonable likely to render reasonably effective assistance. In Washington v. Watkins, supra, the court reviewed the counsel's education, experience, and expertise in criminal cases. Recently, in Bell v. Watkins, 692 F.2d 999 (5th Cir.1982), the court considered the assistance reasonable likely to be rendered by a recent law school graduate. The court ruled that such assistance would not be held ineffective as a matter of law.

The second line of inquiry is to determine whether counsel in fact rendered reasonable effective assistance in that case. Bell v. Watkins, supra. In addition, if counsel failed

to provide reasonable effective assistance, the defendant must show that he was prejudiced in a way that would not have come about had his rights been constitutionally protected. Washington v. Watkins, supra at 1360. Thus, the petitioners must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of their defense. Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982) (overruling Washington v. Strickland,d 673 F.2d 879 (5th Cir.1982). And, "even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." (emphasis ours.) Id.

Addressing the first line of inquiry regarding whether counsel was reasonable likely to render reasonably effective assistance, we note that in the lower court counsel for the defendants were Alix H. Sanders and Fred Sanders of Greenwood. On the appeal phase to this Court, the file reflects counsel to be Alix H. Sanders and Charles Victor McTeer of Greenville. No background appears on education, experience, or expertise.[2] In fact, the petition for writ of error coram nobis does not contend that counsel was

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[2]Law listings reveal that Alix H. Sanders was born in 1942 and received a B.A. Degree from Jackson State College, Jackson and a J.D. Degree from University of Mississippi. He was admitted to the Bar in 1969. Charles V. McTeer was born in 1948. His B.A. was from Western Maryland College and his J.D. Degree was from Rutgers University.

reasonably unlikely to render reasonably effective assistance because of inadequate education, experience, or expertise in criminal cases. Therefore, we must conclude that both trial and appellate counsel were reasonable likely to render effective service.

As to the second inquiry, we must discuss the performance actually rendered to determine whether counsel provided reasonably effective assistance. Specific areas of alleged ineffective performance in this petition may be summarized as follows:

I.

ON PRETRIAL

1. Counsel's failure to properly prepare and investigate the background of the case.

II.

DURING TRIAL

2. Counsel's failure to subpoena available witnesses who could corroborate the defendant Carthan's testimony as to the appointment of Andrews.

3. Counsel's failure to object to hearsay testimony from Jewel McPhail on the appointment of the police chief.

4. Counsel's failure to present evidentiary support on lawful appointment of a police officer.

5. Counsel's failure to submit proper instructions.

6. Counsel's failure to raise objections in constitutional terms.

III.

ON APPEAL

7. Failure to properly assign error in accordance with applicable

state law and in constitutional terms with authorities cited.

In analyzing the allegations of ineffective assistance, we note that the petition assigns the above enumerated shortcomings in very broad general terms. No allegation with specificity is given as to which unnamed witnesses were available, what witness would corroborate testimony, what instructions of the law were omitted, or what objections to testimony were overlooked by defense counsel.

In addition to the above inadequacies the defendants failed to show how their case was prejudiced by such omissions with specificity. The petitions make no such allegation of how the outcome of the proceedings would have been altered had counsel performed differently.

Since the application fails to state, with specificity, the grounds of ineffective assistance of counsel and the resulting prejudice to the petitioners' defense, we are unable to grant the petitioners leave to file a petition for writ of error coram nobis with the lower court. Miss. Sup. Ct. Rule 38. However, the petitioners are granted leave to file a new application and affidavits showing more specific examples of ineffective counsel, if any, and of resulting prejudice.

III.

On the issue concerning the motion for bail filed by Eddie James Carthan,[3] we must deny his request for relief, having denied the petition for writ of error coram nobis.

ALL JUSTICES CONCUR.

Dated: February 18, 1983

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[3]Eddie James Carthan has also been convicted of the federal crime of obtaining loans from a federal bank through the making of false statements. His conviction for that crime has been affirmed as well. United States v. Carthan, No. 82-4090, slip op. at 1 (5th Cir. Jan. 3, 1983).

APPENDIX 4

IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

----------X

SAMUEL CALLAHAN, DAVE McLAURIN,
EDDIE JAMES CARTHAN, JOHN DALE,
TOM COMMON, R. JAMES MATTHEWS
AND GARRETT JOHNSON

v. No.53361

STATE OF MISSISSIPPI

----------X

PETITION FOR WRIT OF ERROR CORAM NOBIS

COMES NOW the petitioners, SAMUEL CALLAHAN, DAVID McLAURIN, EDDIE JAMES CARTHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS and GARRETT JOHNSON, by and through their attorney of record Hon. Charles Victor McTeer and file this Petition for Writ of Error Coram Nobis vacating the judgment of this Court of August 18, 1981, which affirmed the conviction of petitioners

for simple assault upon a law enforcement officer and for grounds would show the following, to-wit:

1. This petition brings before the court the conviction of the petitioners under circumstances representing a gross violation of their constitutional rights.

2. Petitioners were convicted of assaulting a police officer, one of his subordinates, by a trial jury which was not instructed as to the powers of the Mayor as chief law enforcement officer of the commmunity. The case was submitted to the jury despite the indisputable facts establishing that the Mayor was absolutely correct, and duty bound by Mississippi law to disarm and discharge his subordinate who was abiding in an effort to usurp, by force, the powers of the mayor.

3. The trial conviction of petitioners has meaning far beyond the confines of the due process issues in this case. The violation of constitutional rights is so gross that it can only be read as a challenge to the exercise of full voting right by the black people of Mississippi as guaranteed by the Fifteenth Amendment of the U.S. Constitution. Petitioners were prosecuted, and stand convicted ultimately because Carthan was the first black mayor elected in the town of Tchula -- a circumstance which its white minority population has bitterly resisted and the conviction was achieved through patent denial of due process rights.

4. The State's unexpected concession at oral argument before this Court that James Andrews was not lawfully appointed police chief on April 30,

1980 revealed the fundamental constitutional flaws in this case. That factual issue was the cornerstone of the State's case at trial. The concession placed, in the constitutional perspective, the trial court's failure to instruct the jury on fundamental legal principles - the powers and duties of the Mayor and the requirements for lawful appointment of a police chief. The failure to so instruct violated petitioners' right under the due process clause of the Fourteenth Amendment of the United States Constitution.

5. Beyond that, however, the concession established a critical constitutional flaw in the prosecution. The State has now admitted that it had provided a set of facts and legal theories known to be false. This act

constitutes an independent denial of due process of law.

6. This Court, in its opinion dated August 18, 1982, sustained the convictions without mentioning the concession pointed out above. However, because of that concession, this Court could not possibly sustain the convictions on the theory upon which it was tried and presented to the jury. Accordingly, in its opinion, this Court developed a new theory upon which to sustain the convictions.

7. This petition is based upon the submitted memorandum of points and authorities, the attached affidavit of counsel, exhibits attached hereto and the records and files herein.

8. In June, 1977, Eddie James Carthan was elected the Mayor of Tchula by defeating a white person - former Town Marshall, Jim Andrews. Although

Tchula's population had been predominantly black for many years, Mr. Carthan was the first black person to serve as Mayor of the Holmes Court hamlet. Numerous incidents soon followed the 1977 election demonstrating that municipal government in Tchula would be beset with continued bickering, legal maneuvering and racial tension. The Tchula Board of Aldermen, elected in 1977 with Mr. Carthan, included four blacks and one white. Two of the black members of the Board began to side with the one white Board member upon various controversial issues. As a majority, these three officials reduced the mayor's salary from $600 per month to $60. They often refused to attend numerous Board meetings, thereby denying the City a quorum to conduct municipal business. They often refused to approve City

checks and drafts. On one occasion, they closed the doors of City Hall for municipal business. Soon Mayor Carthan was thwarted in any attempt to govern the City under the powers afforded him under Mississippi law or exercise the authority formerly exercised by his white predecessors. Municipal business came to a practical standstill.

9. In April, 1980, the entire Tchula Police Department resigned. Thereafter, Mayor Carthan, exercising his powers and duties, appointed officer John Dale to run the Department pending appointment of a new chief by the Board of Aldermen. On April 30, 1980, a special meeting was held by the Board to appoint the new police chief. Following a heated discussion, the meeting ended without any decision. Thereafter, the three majority members of the board met privately at a local

convenience store and decided Jim Andrews, Mr. Carthan's 1977 mayoral opponent, should be chief.

10. Andrews was immediately notified. Acting quickly, Andrews armed himself and went to see Johr Dale who was on duty at the police department. Andrews advised Dale he was terminated. Dale left the premises and notified Mayor Carthan of the recent events. Carthan contacted the Sheriff regarding the matter. The Sheriff, however, took no action. Carthan and others then went to City Hall to talk to Mr. Andrews. Meanwhile, two other municipal employees - Officer James Harris and night watchmen James T. Rhynes, in the absence of any authority, joined and assisted Mr. Andrews in his takeover of the City Hall.

11. An altercation ensued after the two groups confronted each other in

the police department. As a result of those events, Carthan filed an affidavit complaining that Andrews assaulted him with a weapon. Andrews filed a similar affidavit against Carthan and his group. The State declined to prosecute Mayor Carthan's charges. Instead, the charges were pursued solely against Mr. Carthan and his supporters.

12. At trial, held before the Hon. Franklin Webb of the Circuit Court of Holmes County on April 20 and 21, 1981, the central thesis of the State's case was that James Andrews was lawfully appointed as police chief on April 30, 1980. The State neither argued not submitted instructions that the issue was whether the Mayor and his police had used "excessive force" -the theory upon which this court sustained

the conviction. The State's theory was based on Andrews' status - if Andrews was lawfully appointed, the Mayor was engaged in an assault by taking over the police department.

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[1] The State called Jewel McPhail as its first witness to testify concerning the minutes of the Board of Aldermen on April 30, 1980. She stated that the minutes "reflect that Jim Andrews was hired as a --- Chief of Police the night of April 30." R.35; Opinion of the Mississippi Supreme Court p.12 (hereinafter referred to as "Op.") Andrews testified that he considered himself the duty authorized city police chief because of the directions of the majority of the Board of Aldermen following the special meeting. Op.p.18.

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13. All proposed defense instructions relating to the duties and powers of the Mayor and Andrews' lawful status were rejected by the trial court.

14. The jury was not told of the lawful powers and duties of the Mayor nor of the requirements for lawful

appointment of Andrews as police chief. There was no indication that Harris's lawful authority to refuse the Mayor's command that he leave the City Hall premises was dependent upon Andrews' doubtful status of chief of police.

15. The constitutional issues in this case arising out of the State's concession at oral argument were duly presented to the court promptly after they arose by way of a motion and supplemental memorandum of law (Exhibit I). As indicated in that memorandum, the effect of that concession was that the State of Mississippi was asking a jury to convict without regard to the law and upon a factual and legal theory that the State recognized to be invalid, thereby violating fundamental notions of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

16. The constitutional issues arising from this Court's effort to sustain the conviction upon a theory different from the basis upon which it was tried is here presented for the first time. It could not have been presented before this Court announced its opinion.

17. The constitutional issues arising from the trial Court's failure to properly instruct the jury were duly presented at trial, although not in constitutional terms. The issue was first raised in constitutional dimensions in petitioners' post-argument supplemental memorandum. The failure of trial counsel to recognize the constitutional violations and assign error in constitutional terms denied petitioners effective assistance of counsel. Trial counsel failed not only to understand the broad constitutional

dimensions of this case, but the essence of the case itself as indicated by the trial record. Trial counsel failed to properly prepare and investigate the factual background of this case. No available witnesses were subpoenaed or called to testify regarding the events in Tchula that led to this incident. This testimony was necessary to an adequate factual understanding of the case and its Fifteenth Amendment context.

18. Trial counsel failed to investigate, prepare and call available witnesses to corroborate Carthan's version of the events. Counsel failed to properly investigate, prepare and present a crucial aspect of the case whether James Andrews was lawfully appointed on April 30, 1980. Certain members of the Board of Aldermen were not called to testify, each of whom

could have established that Andrews was not lawfully appointed.

Trial counsel failed to object to the hearsay testimony of Jewel McPhail upon the critical aspect of the case - the appointment of Andrews. McPhail testified from minutes of the April 30, 1981 meeting. Not only was there no foundation to allow McPhail to testify as to contents of the minutes but McPhail's testimony concerning those minutes was incorrect.[2] Counsel failed to present testimony on the method for lawful appointment of a police chief. Counsel failed to establish whether or not Harris had been told, by the petitioner Mayor, that the "police department would continue as it was" thereby substantiating that Harris was acting outside the "scope of the his duties."[3] Counsel presented instructions to the

Court pertaining to lawful appointment of a police chief without evidentiary support.[4]

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[2] The minutes of the meeting of the Board of Aldermen on April 30, 1981 clearly show that Andrews was not appointed.

[3] This testimony was presented at the hearing on the motion to quash but not at trial. Op.p.5. Failure to present such testimony certainly cannot be deemed a trial tactic since there was no tactical reason for its exclusion.

[4] Instruction 8 and 9. As to Instructions 6, evidence existed to support this instruction. See, Brief p. 5 infra.

Trial counsel failed to submit specific instructions that would be deemed proper by the Mississippi courts. Counsel failed to make motions of record to insure adequate review on appeal. Counsel failed to properly object to the trial court's wholesale failure to instruct the jury on the law

of the case. At trial, exceptions were not supported with appropriate authority, nor raised in constitutional terms. On appeal, trial counsel failed to properly note assignments of error in accordance with applicable state law, failed to raise critical constitutional issues and failed to cite appropriate authorities.

19. The opinion of the Supreme Court of Mississippi, announced on August 18, 1982, affirmed the convictions. The opinion did not address the constitutional issues raised in petitioners' supplemental memorandum nor did the opinion directly address the effect of the critical fact of the States' concession.

WHEREFORE, PREMISES CONSIDERED, the Petitioners pray the Court grant the Petition for Writ of Error Coram Nobis and upon due consideration order

that the conviction of April 21, 1981, be set aside and that the defendants be granted a new trial.

RESPECTFULLY SUBMITTED, this 29th day of September, 1982.

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No. 82-1023

In the Supreme Court of the United States

October Term, 1982

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN and EDDIE JAMES CARTHAN,
Petitioners,

vs.

STATE OF MISSISSIPPI,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

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QUESTIONS PRESENTED

A.

Should Certiorari be granted to consider a claim when certain factual questions remain unresolved relative to the State's alleged concession and, alternatively, where the status of James Andrews as Chief of Police has been deemed irrelevant in the prosecution of these petitioners for the assault on James Harris.

B.

Should Certiorari be granted to consider Fourteenth Amendment Due Process claims concerning certain jury instructions when petitioners failed to timely raise an objection on said grounds at the trial level and where the Mississippi Supreme Court in denying post-conviction collateral relief deemed such procedurally barred.

C.

Should Certiorari be granted to consider a claim of ineffective assistance of counsel when the Mississippi Supreme Court dismissed the claim without prejudice for failure to comply with Miss. Sup. Ct. Rule 38.

D.

Should Certiorari be granted to consider Thirteenth, Fourteenth, and Fifteenth Amendments claims of racial discrimination which were barred based upon independent and adequate State procedural grounds.

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No. 82-1023

In the Supreme Court of the United States

October Term, 1982

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN and EDDIE JAMES CARTHAN,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

I. PREFACE

Petitioners, Samuel Callahan, John Dale, Tom Common, R. James Matthews, Garrett Johnson, David McLaurin and Eddie James Carthan, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi rendered in an en banc decision dated February 16, 1983, denying their Application for Leave to File a Petition for Writ of Error Coram Nobis.

II. OPINIONS BELOW

Direct Appeal. The opinion of the Supreme Court of Mississippi upholding petitioners' convictions and sentences is reported as *Callahan v. State*, 419 So.2d 165 (Miss. 1982).

State Post-Conviction Decisions, The Supreme Court of Mississippi panel opinion denying petitioners' Application for Leave to File a Petition for Writ of Error Coram Nobis is unpublished and was withdrawn. The en banc opinion of the Court denying the application is reported as *Callahan v. State*, 426 So.2d 801 (Miss. 1983).

III. JURISDICTION

Petitioners seek to invoke the jurisdiction of the Court by way of a Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1257(3). Respondent does not take issue with the jurisdictional requisite as it pertains to proposition A as framed in the State's response; however, jurisdiction is improperly invoked under § 1257(3) as it pertains to questions B, C, and D as framed hereunder. Respondent's position in opposition to jurisdiction is hereinafter set forth in our argument.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have adequately identified and set forth the constitutional and statutory provisions involved in this cause. For the reasons stated in respondent's arguments, the claims raised is proposition B, C, and D are not properly before the Court.

V. STATEMENT OF THE CASE

On October 9, 1980, Samuel Callahan, G. W. Johnson, Dave McLaurin, Eddie James Carthan, John Dale, Tom Common, R. James Matthews, and Garrett Johnson were indicted for aggravated assault on James Harris and James Andrews, law enforcement officers, in the Circuit Court of Holmes County, Mississippi. The Petition *sub judice* deals solely with Cause No. 8328, the assault upon James Harris.

During the course of the proceedings several pre-trial motions were filed including discovery motions and a motion to quash the indictment. The hearing on the motion to quash consumed over one hundred and fifty (150) pages of testimony.

On April 21, 1981, at the conclusion of testimony in a trial that lasted two (2) days, all petitioners were found guilty of the lesser included charge of simple assault on a law enforcement officer.

On May 1, 1981, the petitioners were sentenced to serve terms of three (3) years with the Mississippi Department of Corrections. The sentences of Callahan, Johnson, Dale, Common, and Matthews were suspended, and they were placed on probation conditioned upon payments of fines of Five Hundred Dollars ($500.00) each. McLaurin's was suspended, and he was placed upon probation upon the payment of a One Thousand Dollar ($1,000.00) fine. Carthan was the only petitioner that was required to serve time.

An appeal was taken to the Supreme Court of Mississippi wherein the following assignments of error were raised:

1. The Court erred in denying defendants' motion to quash the indictment on grounds the defendants' ac-

tivities were privileged and did not constitute a crime.

2. The Court erred in not granting appellants' instruction for a directed verdict.

3. The Court erred in denying defendants' motion for a directed verdict on a new trial because of discrepancies in the jury's verdict.

4. The Court erred in granting State's Instruction Nos. 2 and 4.

5. The Court erred in denying defendants' Instruction Nos. 2, 3, 6, 7, 8, 9, and 10.

6. The Court erred in that it improperly instructed the jury on inclusion of a lesser included offense.

7. The verdict of the jury is against the overwlehming weight of the evidence.

8. The verdict of the jury was not unanimous.

Callahan v. State, 419 So.2d 165, 168 (Miss. 1982).

After due consideration of these issues, the Court affirmed the convictions and sentences. *Callahan v. State, supra.*

Of particular significance to the consideration of the matter *sub judice* was the Court's comments on petitioners' constitutional arguments raised for the first time in their brief on direct appeal:

> In their brief, appellants, for the first time, state that the due process rights of appellants under the Fifth and Fourteenth Amendments of the United States Constitution were violated. In the first place, no authority whatever is cited for this contention.

> Furthermore, a constitutional question was not raised in the lower court or in the assignments of error in this Court. Pursuant to the requirements of Mississippi Supreme Court Rule 6(b), we cannot consider such arguments here that were not presented to the lower court, or were not preserved in the lower court and were not advanced on appeal to this Court. Additionally, even assuming that due process question is before this Court, no authority is needed to make a definite conclusion that the charges in the indictment and the hereinabove related evidence on the motion to quash, did not result in the denial of due process rights of appellants. We find that there is no merit in the motion to quash.

Id., at 171.

These comments take on singular importance when viewed in light of the fact that these were the *only* constitutional arguments raised on direct appeal.

Subsequent to oral argument on direct appeal but before an opinion was rendered, petitioners filed a motion for leave to file a supplemental memorandum. The gravamen of the memorandum was that based upon an alleged concession at oral argument by the State that Andrews was not a *de jure* officer at the time of the consultation the defendants were denied due process under the Fourteenth Amendment when the trial court denied Instruction D-6. On August 18, 1982, the motion was denied without opinion.

On or about August 19, 1982, petitioners filed with the Supreme Court of Mississippi an Expedited Application for Stay of Incarceration and Imposition of Fines Pending Filing and Resolution of Petition for Writ of Certiorari. In this application petitioners specifically waived the fil-

ing of a petition for rehearing since every member of the Court had concurred in the opinion. See Application at p. 3.

On August 20, 1982, the application was heard by Bowling, Justice, and was denied based upon Rules 34 and 45, Miss. Sup. Ct. Rules. No petition for rehearing en banc was filed seeking review of the order, and petitioners proceeded to this Court.

On or about August 20, 1982, petitioners filed an Application for Stay of Sentence and Incarceration Pending Petition for Writ of Certiorari. *See*: *Callahan v. State of Mississippi*, Docket No. A-193. In the application petitioners indicated they would raise three (3) points:

1. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the lawful duties and power of a mayor when that mayor is criminally charged as a result of the exercise of that power?

2. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the lawful authority of the mayor to superintend all officers and to deal promptly with any neglect of duty?

3. Whether, the trial court, consistent with the due process clause of the Fourteenth Amendment, was required to instruct the jury on the requirements for the lawful appointment of a Police Chief when the appointment became a factual issue at trial and, on appeal, the state concedes the issue?

In response to the application the state pointed out that none of the constitutional questions posed had been

properly predicated in the State Courts; therefore, there was not a reasonable probability that four (4) justices would vote to grant certiorari.

Sitting as Circuit Justice, the Honorable Byron R. White denied the application without opinion. As of this date, no petition has been filed with this Court to review the decision of the Supreme Court of Mississippi on direct appeal.

On October 4, 1982, petitioners initiated their post-conviction collateral attack now before this Court for review. In their Application for Leave to File Petition for Writ of Error Coram Nobis petitioners raised four (4) assignments of error. These were:

1. It was a violation of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to fail to instruct the jury on the lawful duties and powers of the mayor and of the requirements for the lawful appointment of a police chief.

2. It was violation of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to obtain a conviction by the use of acknowledged untruths at trial and on appeal, affirm their conviction on considerations different from those raised at trial.

3. The constitutional issues arising from the state's concession at oral argument were duly presented to this court. The issues not presented in constitutional terms denied petitioners' effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

4. The State's use of the criminal process to prosecute a mayor for the exercise of his powers is the most recent tactic by the State of Mississippi to frustrate the reconstruction amendments. This tactic is violative of the petitioners' rights under the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

See Petitioners' Petition for Rehearing.

On November 10, 1982, the Supreme Court of Mississippi in a rather obfuscated opinion denied the petition relying upon the rule announced in *Auman v. State*, 285 So.2d 146 (Miss. 1973). Cross-petitions for rehearing were filed, and responses to each requested by the Court. On February 16, 1983, the Court en banc denied the application holding that grounds one and four were procedurally barred, that ground two was without merit and that petitioners had failed to comply with Miss. Sup. Ct. Rule 38, and that consequently, the issue of ineffective assistance of counsel was not properly before them. *Callahan v. State*, 426 So.2d 801 (Miss. 1983).

In this posture petitioners now seek review by this Court.

VI. REASONS FOR DENYING THE WRIT

A.

Certain Factual Questions Remain Unresolved Relative to the Exact Nature of the State's Alleged Concession and, Alternatively, the Status of James Andrews As Chief of Police Was Irrelevant in the Prosecution of These Petitioners for the Assault on James Harris

The writ should be denied under petitioners' reason "A", page 19 of the petition, for two (2) reasons. First, the identical issue presented here is presently pending in a habeas corpus petition filed by petitioner Carthan in Civil Action No. J82-0679(R) in the United States District Court for the Southern District of Mississippi, Jackson Division.[1] We respectfully submit that said forum is better equipped than this Honorable Court to reconcile an unresolved factual dispute inherent in this issue, i.e., the exact nature and scope of the State's so-called "concession" at oral argument of the direct appeal.[2] This Court's valuable and overburdened judicial time should not be further burdened by reviewing a state court decision that contains an unresolved factual dispute that is presently pending and in

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1. Likewise, the other claims presented by this petition are also pending in the habeas court.

2. For example, we disagree with petitioners' bald allegations that the state conceded on argument that false evidence was used at trial and that it admitted that there was an "unlawful usurpation of a town's police department". Supplemental Brief to Petition, p. 6. On the contrary, the state's only concession pertained to the failure of the proof to show that the statutory requirements for the appointment of a *de jure* chief of police were met. Rather, the state argued that Andrews' appointment met the requirements of a *de facto* officer under MCA 1972, § 25-1-37, and therefore his actions were completely lawful.

due course likely will be resolved in a federal habeas court.

Second, the writ should be denied under reason "A" because, contrary to petitioners' assertions, the decision of the Supreme Court of Mississippi is not in conflict with the previous decisions of this Court cited by petitioners. Said decisions are factually and legally distinguishable.

The cases cited by petitioners, *Napue v. Illinois*, 360 U.S. 264; *Alcorta v. Texas*, 355 U.S. 28; *Pyle v. Kansas*, 317 U.S. 213; and *Mooney v. Holohan*, 294 U.S. 103, involved either the use by the state at trial of testimony or evidence that it knew to be false and the suppression of evidence that would have refuted or impeached said testimony or evidence, or the failure of the state to correct testimony or evidence that it knew to be false. In each case, the defendant was ignorant of the false testimony or evidence when introduced, was not guilty of a lack of diligence in discovering its falsity, and the jury was unaware of facts which would have refuted or impeached the falsity.

Contrary to the cited cases, there is no proof in the case at bar that the state knowingly used false testimony or evidence to convict petitioners or that false testimony or evidence was knowingly allowed to go to the jury uncorrected. The facts surrounding the appointment of Andrews as chief of police were fully aired before the jury, *and nothing pertaining to that appointment ever has been conceded by the state to be false or shown to be false by petitioners.* As previously stated, the only concession made by the state at oral argument on direct appeal pertained to the failure of the state's evidence to prove that Andrews' appointment sufficiently met the statutory requirements necessary to qualify him as a de

jure officer. The state argued, consistently with the evidence presented at trial, that Andrews had *in fact* been appointed chief by a majority of the Board of Aldermen for the town, that this fact was known by Officer Harris and that under state law, Andrews' acts as a *de facto* officer were lawful. Alternatively, the state argued, and the Supreme Court of Mississippi found, that the *de jure* status of Andrews was not determinative of the outcome of the assault convictions of James Harris. Nothing inherent in this argument or decision is even closely akin to the use of false testimony found to exist and violate due process in this Court's decisions in *Napue, Alcorta, Pyle* and *Mooney, supra.* Consequently, there is nothing in the decision at bar that conflicts with said decisions requiring or meriting review on certiorari.

Nor does the Mississippi Court's decision conflict with *Cole v. Arkansas,* 333 U.S. 196. In *Cole* the state appellate court affirmed the petitioner's convictions under a section of a criminal statute that was separate, distinct and substantially different from the section under which they had been indicted, tried and convicted in the trial court. These two (2) separate offenses contained different elements and proof, and the theory of prosecution consequently was different for each. Needless to say, this Court found that affirmance under such circumstances violated petitioners' due process rights guaranteed by the Fourteenth Amendment.

On the contrary, in the case at bar petitioners' convictions were prosecuted from inception in the lower courts to finality in the appellate court as an assault upon the person of James Harris not Jim Andrews. Nothing that occurred at trial or in the Supreme Court changed either the elements of the crime or the "theory" of the state's case. The "theory" that the status of James Harris as

a police officer acting within the scope of his duty depended *exclusively* upon the *de jure* status of Jim Andrews was injected into the case for the first time on appeal by the petitioners not by the state.[3] The state simply never contended at trial or otherwise that Andrews' *de jure* status was outcome determinative on the issue of the factual and legal status of James Harris and hence petitioners' convictions,[4] consequently, the affirmance by the Supreme Court of Mississippi on the same charge and theory upon which the case was prosecuted at trial does not conflict with this Court's decision in *Cole, supra,* and certiorari review is not merited on this basis.

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3. This is not to suggest that Andrews' status as a *de jure* officer was irrelevant to the state's theory of the case. Even though the state was not required to prove that Harris' status depended exclusively upon the status of Andrews, it was certainly permissible for the state to prove that Andrews' appointment met all of the statutory requirements and that Harris' status did in fact flow from said appointment. However, that the state's proof of Andrews' *de jure* status failed does not change the legal or factual basis of the prosecution. Nothing in *Cole* even remotely suggests that the state is precluded by the due process clause from prosecuting on a factually alternative basis.

4. The city clerk's testimony, cited by petitioners on page 4 of their supplemental brief, is not to the contrary. Her testimony was as equally relevant on the issue of Andrews' *de facto* status as it was his *de jure* status. Regardless, the decisive factor here is that the state did not request and the court did not give instructions informing the jury that Andrews' status was determinative of the outcome of the charge involving Harris.

B.

Certiorari Should Be Denied Because This Court Is Precluded From Considering Petitioners' Fourteenth Amendment Due Process Claims Concerning the Failure of the Trial Court to Instruct the Jury on the Lawful Duties and Powers of the Mayor and the Requirements for Lawful Appointment of a Chief of Police Since the Supreme Court of Mississippi Denied Relief on the Basis of an Independent and Adequate State Rule of Procedure

The second question posed by petitioners concerns an alleged failure of the trial court to instruct the jury on questions of purely state law; i.e., (1) the lawful duties and authority of a mayor and (2) the requirements for the lawful appointment of a Chief of Police.

At trial petitioners tendered for the Court's consideration seven (7) instructions concerning the duties and authority of a mayor of a code chartered municipality under Miss. Code Anno. § 21-3-1 *et seq.* (1972) and one concerning the legal requirements for the appointment of a chief of police. Of these eight (8) instructions, four (4) were refused as abstract statements of the law,[5] three (3) were withdrawn,[6] and one (1) was included in the Court's charge to the jury.[7]

On direct appeal petitioners assigned as error the trial court's refusal to grant Instru ons D-2, D-3, D-6, D-8, and D-9. However, the substance of the argument rested upon State authority. No constitutional arguments were advanced or cases predicated upon such cited.

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5. See Instructions D-2, D-3, D-6, D-8, and D-9. (R. 328-29, 332, 334)

6. See Instructions D-4, D-5, and D-7. (R. 330-31, 333)

7. See Instruction D-4. (R. 353)

In affirming the trial judge's refusal of proffered instructions, the Mississippi Supreme Court held:

> The above set out instructions, the refusal of which is complained of by appellants as being erroneously refused, clearly were erroneous. They all were abstract statements of law, mostly the quoting of statutes describing the duties of municipal officials, principally the mayor. We have held in many cases that abstract instructions such as the ones complained of here should not have been given. *Harkins v. Paschall,* 348 So.2d 1019 (Miss. 1977); *Freeze v. Taylor,* 257 So.2d 509 (Miss. 1972); *New Orleans J. & G. N. R. Co. v. Statham,* 42 Miss. 607 (1869); 53 Am. Jur., *Trial* § 573, p. 451 (1945); 38 Am. Jur., *Negligence* § 370, p. 1089 (1941). The trial judge granted defendants' Instruction No. D-4 which was not in the abstract and included the matters sought to be placed before the jury in the refused instructions. D-4 reads as follows:
>
> > The court instructs the jury that if you find from the evidence that the Mayor, Eddie J. Carthan believed a breach of the peace was taking place in the Town of Tchula on April 30, 1980, and because of his belief, the Mayor exercised his lawfully (sic) authority to call on the policemen and other citizen (sic) to aid in enforcing the laws and that the acts, if any, of Eddie James Carthan, John Dale, Samuel Callahan, David McLaurin, Tom Common, R. James Matthews, and Garrett Johnson toward James Harris were justified and necessary in discharging the legal duty of the Mayor or in lawfully keeping and preserving the peace, then you shall find the defendants "not guilty."

> In addition to refusing Instruction No. 6 as being in the abstract and not related to other facts necessary for consideration by the jury, the instruction relates only to the controversy as to whether or not Jim Andrews had fully qualified as chief of police on the night in question. As we have seen, this case does not involve an alleged attack on Andrews and is not determined by whether or not he was fully qualified by not performing the acts set out in the instruction. The indictment and the trial were for an alleged attack on an admittedly full-time policeman, James Harris. The question for the jury to have considered was whether or not Harris, admittedly on twenty-four-hour service, was acting in the furtherance of that service and his duty at the time of the alleged assault. The jury was fully instructed on this question.
>
> *Callahan v. State, supra,* 419 So.2d at 176-77.

The argument now advanced by petitioners was raised for the first time in their application for post-conviction relief.

In Mississippi post-conviction collateral relief is obtained by way of a Writ of Error Coram Nobis. See Miss. Code Anno. § 99-35-145 (1972); *Edwards v. Thigpen,* Miss. Sup. Ct. Docket No. 53,298 (opinion not yet published, March 23, 1983); *Minor v. Lucas,* 697 F.2d 697 (5th Cir. 1983).

Like the Federal Courts, the Mississippi Courts will not recognize errors or objections unless a timely challenge is raised. See Rules 30 and 52, Fed. R. Crim. P.; *United States v. Sanders,* 639 F.2d 268 (5th Cir. 1981); *United States v. Miller,* 600 F.2d 498 (5th Cir. 1979); *Parker*

v. State, 367 So.2d 456 (Miss. 1976); *Martin v. State*, 354 So.2d 1114 (Miss. 1978); *Stringer v. State*, 279 So.2d 156 (Miss. 1973). Like its federal counterparts, Rules 30 and 52, Fed. R. Crim. P., the state practice is based upon specified rules of procedure.

Rule 6, Miss. Sup. Ct. Rules, provides:

Assignments of Error

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (2). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Likewise, Rule 11, Miss. Sup. Ct. Rules, states:

No Reversal for Harmless Error

No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

In specific reference to jury instructions, the Court provided in Rule 42, Miss. Sup. Ct. Rules, for the following:

> *Instructions*
>
> The judges of the circuit courts of Mississippi have adopted uniform rules of procedure for the circuit courts, and among those rules adopted is Rule 14 requiring attorneys to file jury instructions with the circuit clerk and to deliver copies of the instructions proposed to be given the jury to opposing counsel before the trial. The rule further provides that attorneys are required to dictate their specific objections to an instruction offered, thus giving the trial judge an opportunity to pass upon the objections before the case is argued before the jury.
>
> After considering the foregoing rule, we are convinced that it will aid in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection. However, in extreme cases this Court may raise an objection to a jury instruction in order to prevent manifest injustice.

Supplementing this rule, the Mississippi Supreme Court held in *Newell v. State,* 308 So.2d 71, 78 (Miss. 1975) that a "trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so." Succinctly stated, contemporaneous objection is necessary to preserve a point on appeal. *Pittman v. State,* 297 So.2d 888 (Miss. 1974); *Myers v. State,* 268 So.2d 353 (Miss. 1972).

As previously mentioned, like Ohio in *Engle*, Mississippi provides only limited collateral review of convictions. *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964). In a post-conviction context prisoners may not raise claims that could have been litigated before judgment or on direct appeal, *Holloway v. State*, 261 So.2d 799 (Miss. 1972), nor may they raise claims which have been heretofore litigated. *Auman v. State*, 285 So.2d 146 (Miss. 1973); *Wetzel v. State*, 225 Miss. 450, 76 So.2d 194 (1955); Miss. Code Anno. § 99-35-145(9); Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979). Additionally, a prisoner must use diligence in the presentation of his petition and delayed, successive, or dilatory petitions are barred. *Wetzel v. State, supra; In re Broom's Petition, supra; Holloway v. State, supra.*

As previously mentioned, the procedure for filing a post-conviction collateral petition in Mississippi is set forth in § 99-35-145, Miss. Code 1972, Annotated and Amended and Rule 38, Mississippi Supreme Court Rules. In situations like the matter *sub judice* where an appeal was taken to the Mississippi Supreme Court, the prisoner must file an application with the Court for leave to file a petition for a writ in the court of original jurisdiction. Once the pleading requirements are met, the Court will then examine the case to determine whether a case for relief or probable cause can be made out. *Wheeler v. State*, 219 Miss. 129, 70 So.2d 82 (1954); *Thornhill v. State*, 246 Miss. 312, 149 So.2d 27 (1963); *Fondren v. State*, 187 So.2d 327 (Miss. 1966). In ascertaining whether a claim for relief can be made the Court will consider the application, petition, briefs, affidavits, and all previous proceedings involving the same matter which had been filed with the Court. *Yates v. State*, 189 So.2d 917 (Miss. 1966); *Wheeler v. State, supra.*

In summarizing these rules the Mississippi Supreme Court in the instant matter stated:

> We first address the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such post-conviction petitions are limited in nature. Justice Ethridge, in the case of *In re Broom's Petition,* 251 Miss. 25, 168 So.2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:
>
> > The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. *There must be some error of fact and not of law* affecting substantially the validity and regularity of the proceedings, *which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial.* [Emphasis added]. [251 Miss. at 32-33, 168 So.2d at 48].
>
> With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. *Auman v. State,* 285 So.2d 146 (Miss 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to

> him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." *Holloway v. State,* 261 So.2d 799, 800 (Miss. 1972).
>
> *Callahan v. State, supra,* 426 So.2d at 803.

Consequently, the Court held that the petitioners' first assignment of error concerning the failure of the trial judge to grant certain requested instructions had been raised on direct appeal and that the Court could not reconsider the same factual question in a post-conviction collateral setting recast in constitutional terms. The Court stated:

> The same issue was raised by the petitioners on appeal. 419 So.2d at 176. The proper time to reconsider such an issue would have been on a rehearing of the appeal, but the petitioners failed to file for a rehearing. They cannot now attempt to relitigate a question of law already decided on appeal by this Court through a petition for writ of error coram nobis.
>
> *Callahan v. State, supra,* 426 So.2d at 803.

In this context we review the authority of this Court to review the decision of the Mississippi Supreme Court on this point. A cogent summary of the pertinent principles is found in *Fay v. Noia,* 372 U.S. 391, 428-29, 9 L.Ed.2d 837, 863, 83 S.Ct. 822 (1963):

> It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds. See, e.g., NAACP v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163; Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183. Section 25 of the Judiciary Act of 1789, c 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other

"than such as . . . immediately respects . . . questions of validity or construction of the said [Federal] constitution, treaties, statutes, commissions, or authorities in dispute." The deletion of the express restriction by the Judiciary Act of February 5, 1867, c 28, § 2, 14 Stat. 386-387, did not enlarge this Court's power in that regard. Murdock v. Memphis (US) 20 Wall 590, 22 L.Ed. 429. Murdock was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459; Davis v. Wechsler, 263 U.S. 22, 68 L.Ed. 143, 44 S.Ct. 13; Ward v. Board of County Comrs., 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419. Thus, a default such as Noia's, if deemed adequate and independent (a question on which we intimate no review), would cut off review by this Court of the state coram nobis proceedings in which the New York Court of Appeals refused him relief. It is contended that it follows from this that the remedy of federal habeas corpus is likewise cut off.

See also: *Parker v. North Carolina*, 397 U.S. 790, 25 L.Ed. 2d 785, 90 S.Ct. 1458 (1970); *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966). Accord *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965); *Beck v. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962); *Ferguson v. Georgia*, 365 U.S. 570, 5 L.Ed.2d 783, 81 S.Ct. 756 (1961); *Ellis v. Dixon*, 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850 (1955).

The conclusion is, therefore, obvious. Because petitioners had failed to raise their constitutional objection in a timely fashion, collateral relief was unavailable. This State rule of practice constitutes an adequate state ground precluding review by this Court. Cf. *Gray v. Lucas*, 677 F.2d 1086, 1109 (5th Cir. 1982).

C.

Certiorari Should Be Denied Because the Petitioners Did Not Comply With Rule 38, Miss. Sup. Ct. Rules, in Presenting Their Claims of Ineffective Assistance of Counsel Resulting in the Dismissal of Their Application on This Ground Without Prejudice

Rule 38, Miss. Sup. Ct. Rules, provides for the following:

> Every application for leave to five a petition for writ of error coram nobis in the lower court shall have attached thereto the original and two executed counter-parts of the petition proposed to be filed in the lower court, which shall be sworn to by petitioner. Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of fact not within the personal knowledge of petitioner, it shall have attached affidavit or affidavits of some other person or persons having knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown. The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel. The petition shall be endorsed by a statement by petitioner's counsel, if any, that he believes the petition for writ of error coram nobis is well taken, and should be issued. The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal. In the event leave

is granted to file the petition the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court.[8]

In dismissing petitioners' claims of ineffective assistance of counsel without prejudice, the Mississippi Supreme Court stated:

> In analyzing the allegations of ineffective assistance, we note that the petition assigns the above enumerated shortcomings in very broad general terms. No allegation with specificity is given as to which unnamed witnesses were available, what witness would corroborate testimony, what preparation or investigation was omitted, what testimony was hearsay, what instructions of the law were omitted, or what objections to testimony were overlooked by defense counsel.
>
> In addition to the above inadequacies the defendants failed to show how their case was prejudiced by such omissions with specificity. The petitions make no such allegation of how the outcome of the proceedings would have been altered had counsel performed differently.
>
> Since the application fails to state, with specificity, the grounds of ineffective assistance of counsel and the resulting prejudice to the petitioners' defense, we are unable to grant the petitioners leave to file a petition for writ of error coram nobis with the lower court. Miss. Sup. Ct. Rule 38. However, the petitioners are granted leave to file a new application and affidavits showing more specific examples of ineffective counsel, if any, and of resulting prejudice.

Callahan v. State, supra, 426 So.2d at 805-6.

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8. See also: *Baker v. State,* 358 So.2d 401 (Miss 1978); *Brown v. State,* 275 So.2d 103 (Miss. 1973).

A similar situation was presented to this Court in the case of *In the Matter of Marshall Lamkin*, 355 U.S. 59, 2 L.Ed.2d 107, 78 S.Ct. 137 (1957), wherein the Court in a per curiam opinion held:

> The petition for writ of certiorari is denied. The judgment below rests on an adequate state ground since petitioner, in filing his application for habeas corpus in the state court, failed to comply with applicable state procedures. *See*: *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed.2d 158, 56 S.Ct. 183 (1953).

The logic underpinning Rule 38 is simple. In order for the Court to make a determination of probable cause to issue leave to proceed it must be provided with sufficient facts to ascertain that the allegations are not frivolous or patently false.

The Court in its decision has outlined those items upon which petitioners should elaborate in any new petition.

Consequently, the decision of the State Court rests upon adequate state procedural grounds, and certiorari should be denied.

D.

Certiorari Should Be Denied Because the Question Concerning the Prosecution of Petitioners As a Means of Disenfranchising Black Elected Officials in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments Was Not Timely Raised and Is, Therefore, Based Upon Independent and Adequate State Procedural Grounds Barred From Review

Succinctly stated, petitioners complain that the prosecution of the case against them was simply another chapter in what they label the "Mississippi Plan" to disenfranchise

black voters. Stated simply, the prosecution of these people in this case was an intentional act of racial discrimination. Prior to trial, petitioners filed a motion to quash the indictment claiming among other things that the State arbitrarily chose to prosecute the case against them. No constitutional grounds were urged in support thereof.

On direct appeal petitioners questioned the trial judge's denial of the motion and for the first time in somewhat cryptic language suggested constitutional error. However, the entire corpus of the argument consisted of the following:

> Defendants assert that they have been denied a fair trial [sic], that their due process rights under the 5th and 14th amendments [sic] to the United States Constitution have been violated. The State, by choosing to prosecute the defendants in granting their opponents imunity [sic] has denied these defendants the equal protection of the law. A study of the transcript of the hearings reveals a remarkable record totally void of any basis on which the verdict of the jury can be supported. Defendants [sic] claim is based upon the failure of the trial court to quash the indictments or to instruct the jury in accordance with the applicable law on the statutory authority of the Mayor and those acting in pursuant to his command.
>
> Appellants' Brief at p. 3.

As previously stated the Court held that this argument was procedurally barred for several reasons; i.e., failure to cite authority and failure to comply with Rule 6(b), Miss. Sup. Ct. Rules.

The instant proposition is nothing but a rehash of the issues raised on direct appeal recast in the terms of

the Thirteenth, Fourteenth, and Fifteenth Amendments - discriminatory prosecution.

As has been previously discussed, State procedure requires a prisoner to raise all questions of law to a particular set of facts at the time of trial. *Edwards v. State, supra*; *Auman v. State, supra*; *Holloway v. State, supra*; *In re Broom's Petition, supra.*

The court below denied relief on this point holding that claims of discriminatory and selective prosecution had been raised on direct appeal, although on other grounds. Consequently, the assignment could not meet the "error in fact" requirement of *In re Broom's Petition, supra.*

Consequently, as a State rule of practice this would constitute an adequate State ground precluding this Court from reaching this issue on collateral relief. *See*: *Fay v. Noia, supra*; *Parker v. North Carolina, supra.*

In summary, the issue of whether the State of Mississippi is attempting to disenfranchise black voters by prosecuting these defendants is a violation of the Thirteenth, Fourteenth, and Fifteenth Amendments should have been raised at the trial level and cannot be raised for the first time in a post-conviction collateral petition.

VII. CONCLUSION

The petitioners' contentions pose no question of particular moment or indecision in the case law of the land, and it is, therefore, respectfully submitted that the Petition for Writ of Certiorari in all justice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi and Counsel of Record for the Respondent herein, do hereby certify that I have this day caused three (3) true and correct copies of the above and foregoing Response to Petition for a Writ of Certiorari to be served upon the following:

Morton Stavis, Esquire
Ellen Yaroshefsky, Esquire
Center for Constitutional Rights
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and

Charles Victor McTeer, Esquire
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Attorneys for Petitioners

This, the 28th day of April, 1983.

WILLIAM S. BOYD, III
Special Assistant Attorney General
State of Mississippi

APPENDIX 1

MCA 1972, § 25-1-37. *Acts of de facto officer valid.*

The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not and whether such person be lawfully qualified or not; but such person shall be liable to all the penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right or without being qualified according to law.